Supreme Court, U. S.
FILED
DEC 10 1977
MICHAEL RODAK, JR., CLERK

77-837

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

Number A-451

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and HERMAN SILLAS, as Director of the Department of Motor Vehicles of the State of California,

Appellants,

v.

ORRIN W. FOX CO. a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,

Appellees.

On Appeal From the United States District Court for the Central District of California

Jurisdictional Statement of Appellants New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California and Herman Sillas, as Director of the Department of Motor Vehicles of the State of California

EVELLE J. YOUNGER, Attorney General
of the State of California
ROBERT L. MUKAI
Deputy Attorney General
Counsel for Appellant New Motor Vehicle Board of the State of California
STEPHEN J. EGAN
Deputy Attorney General
Counsel for Appellants Department of Motor Vehicles of the State of California, and Herman Sillas, Director of the Department of Motor Vehicles of the State of California
555 Capitol Mall, Suite 350
Sacramento, California 95814

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
PRELIMINARY STATEMENT AND SUMMARY OF THE CASE	5
THE QUESTIONS BEFORE THE COURT ARE SUBSTANTIAL	10
1. A state regulatory statute does not violate due process of law merely because it mandates delay of proposed commercial activities pending state inquiry in the public interest, without requiring a hearing prior to or accompanying imposition of such delay.	10
2. The District Court was required, under this Court's decisions in *Harris County Commissioners Court v. Moore* (1975) 420 U.S. 77, and *Bellotti v. Baird* (1976) 428 U.S. 132, among others, to abstain from determining the federal issues tendered by plaintiffs' summary judgment motion...	17
CONCLUSION	25
APPENDIX (Exhibits A–H inclusive)	27

2—76771

TABLE OF AUTHORITIES CITED

CASES—UNITED STATES

	Page
Armstrong v. Manzo (1965) 380 U.S. 545	22
Bellotti v. Baird (1976) 428 U.S. 132	4, 18, 23, 24, 25
Calero-Toledo v. Pearson Yacht Leasing Co. (1974) 416 U.S. 633	15
Ewing v. Mytinger & Casselberry, Inc. (1950) 339 U.S. 594 (reh. den. 340 U.S. 857)	13
Fuentes v. Shevin (1972) 407 U.S. 67	11, 14
Goldberg v. Kelly (1970) 397 U.S. 254	16
Harris County Commissioners Court v. Moore (1975) 420 U.S. 77	4, 18, 24
Harrison v. N.A.A.C.P. (1959) 360 U.S. 167	22, 23
Mathews v. Eldridge (1976) 424 U.S. 319	15, 16, 17, 22
Opp Cotton Mills v. Administrator of Wage and Hour Division (1941) 312 U.S. 126	13
Paul v. Davis (1976) 424 U.S. 693	12
Railroad Commission v. Pullman Company (1941) 312 U.S. 946	9, 18
Reetz v. Bozanich 397 U.S. 82	21, 26
Semler v. Oregon State Board of Dental Examiners (1935) 294 U.S. 608	12
Sniadach v. Family Finance Corp. (1969) 395 U.S. 337	11
Williamson v. Lee Optical of Oklahoma (1955) 348 U.S. 483 (reh. den. 349 U.S. 925)	13
Younger v. Harris (1971) 401 U.S. 37	18

CASES—CALIFORNIA

Endler v. Schutzbank (1968) 68 Cal.2d 162	20

STATUTES—FEDERAL

28 U.S.C.:	
1253	3
1331(a)	2
1337	2
1343(3)	2
1391(b)	2
2101(b)	3
2201	2
2281	2, 3, 9
2284	2, 9

TABLE OF AUTHORITIES CITED—Continued

STATUTES—CALIFORNIA

Administrative Procedure Act (Gov. Code §§11500 et seq.) 7
Automobile Franchise Act (Veh. Code §§3060 et seq.) ..... *passim*
Vehicle Code
200 5
201 5
331.1 6
331.2 6
507 6
3000 6
3062 ..... 7, 21, 22
3063 8
3066 subd(a) 7, 21
3066 subd(b) 8
3067 ..... 9, 20
11700 5
Cal.Stats. 1923, ch 266, § 46(a) 5
Cal.Stats 1923, ch 266, § 46(b) 5
Cal.Stats 1967, ch 557, § 2 5
Cal.Stats 1973, ch 996, § 1 6

RULES

Federal Rules of Civil Procedure
60(a) 3

TREATISES

Davis, Kenneth Culp, Administrative Law of the Seventies
(1976) 1977 Supplement 15, 16
Deering, Warren H. California Administrative Mandamus
(1977 Supp.) 20

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

Number A-451

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al.
Appellants,

v.

ORRIN W. FOX CO. a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

JURISDICTIONAL STATEMENT

Appellants New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California, and Herman Sillas, as Director of the Department of Motor Vehicles of the State of California, appeal from the Summary Judgment of the United States District Court for the Central District of California entered on September 15, 1977, and from that Court's Partial Summary Judgment, entered on October 19, 1977, each declaring violative of due process of law under the Fourteenth Amendment to the United States Constitution the provisions of the California Automobile Franchise Act (Cal. Veh. Code §§ 3060–3069) relating to establishment and relocation

of franchised motor vehicle dealerships, and enjoining enforcement of those provisions by appellants. The within statement is submitted to demonstrate that this Honorable Court possesses jurisdiction over this appeal and that the substantiability of the federal questions herein presented warrants immediate consideration and disposition by the Court.

OPINION BELOW

The opinion of the United States District Court for the Central District of California, filed on September 14, 1977 in Civil Action No. 76-1212, WPG, has not been reported and is annexed hereto as "Exhibit A" of the Appendix.

JURISDICTION

The action below was commenced by a Complaint for Declaratory Relief and Injunction, filed on April 13, 1976, alleging jurisdiction and venue in the United States District Court for the Central District of California under 28 U.S.C. §§ 1331(a), 1337, 1343(3), 1391(b) and 2201.

A three-judge court, constituted by the Honorable Walter Ely, Circuit Judge, and the Honorable William P. Gray and the Honorable Robert M. Takasugi, District Judges, was convened pursuant to 28 U.S.C. §§ 2281 and 2284. Following entry of a Summary Judgment adverse to appellants on September 15, 1977, appellant New Motor Vehicle Board filed a Notice of Appeal on October 13, 1977. Appellants Sillas and the

Department of Motor Vehicles filed a Notice of Appeal on October 18, 1977. Following entry of a new Partial Summary Judgment on October 19, 1977, correcting the original Summary Judgment under Rule 60(a) of the Federal Rules of Civil Procedure, appellants Sillas and the Department of Motor Vehicles and appellant New Motor Vehicle Board noted their appeals therefrom on November 17, 1977, and November 21, 1977, respectively. The District Court's Summary Judgment, entered September 15, 1977, and the notices of appeal therefrom, filed by appellants New Motor Vehicle Board and Sillas, are annexed hereto, respectively designated exhibits B, C and D to the Appendix. The District Court's Partial Summary Judgment, entered October 19, 1977, and the Notices of Appeal of Appellants Department of Motor Vehicles and Sillas, and of the New Motor Vehicle Board, are annexed and respectively designated as exhibits E, F, and G to the Appendix.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §§ 1253 and 2101(b), authorizing direct appeal to the United States Supreme Court from an order granting an interlocutory or permanent injunction in a civil suit required by 28 U.S.C. § 2281 to be heard and determined by a district court of three judges.

QUESTIONS PRESENTED

1. Whether due process of law requires that state-mandated delay to proposed commercial

activities pending evidentiary inquiry by the State into objections to the proposed activity, be preceded or accompanied by an evidentiary hearing on the merits of the objection giving rise to the delay thus imposed.

2. Whether this Court's decisions in *Harris County Commissioners Court* v. *Moore* (1975) 420 U.S. 77 and *Bellotti* v. *Baird* (1976) 428 U.S. 132, among others, required the District Court to abstain from determining plaintiffs' claims upon the foregoing federal constitutional question, where the state statute was and is susceptible to at least three interpretations which would at least substantially modify the present federal Constitutional challenge to the statute.

STATUTES INVOLVED

The California Automobile Franchise Act, codified as sections 3060–3069 of the California Vehicle Code, is the subject of this suit and is set forth in full as exhibit H of the Appendix.

PRELIMINARY STATEMENT AND SUMMARY OF THE CASE

The State of California has regulated the business of marketing motor vehicles for nearly sixty years.[1] Relatively recently California has exercised its police power to regulate business relations between the manufacturing and retail sales levels of the motor vehicle marketing business.

In 1973, pursuant to a declared legislative purpose "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide

[1] Ever since enactment of California's Vehicle Act of 1923, for example, dealers and manufacturers of motor vehicles have been authorized through a special exemption from the vehicle registration requirements of the State, to operate motor vehicles on the public highways in connection with their respective businesses. (Cal. Stats. 1923, ch. 266, § 46(a).) In order to secure this exemption from the generally-applicable registration requirements, dealers and manufacturers were required to apply for certification and special identifying license plates. (Cal. Stats. 1923, ch. 266 § 46(b).)

In 1957, the former certification procedure became a licensing provision, and all automobile manufacturers were required to apply for licenses in order to qualify for and continue to hold the registration exemption. (Cal. Veh. Code (1957) § 201.) In addition, it became unlawful on and after October 1, 1957, to act as a dealer (though not as a manufacturer) without first having procured such a license from the Department of Motor Vehicles. (Cal. Veh. Code (1957) § 200.)

The prohibition on unlicensed activity was extended to manufacturers and motor vehicle transporters by Cal. Stats. 1967, ch. 557, § 2. Henceforward, it would be unlawful for any person to act as a dealer, manufacturer, or transporter of motor vehicles without a valid license and certificate issued by the Department of Motor Vehicles. (Cal. Veh. Code § 11700.)

adequate and sufficient service to consumers generally" (Cal. Stats. 1973, ch. 996, § 1), the State of California enacted new requirements substantially affecting several areas of business relations between motor vehicle franchisors and franchisees,[2] and simultaneously established a New Motor Vehicle Board of nine members (Cal. Veh. Code § 3000) empowered to make binding determinations between franchisors and franchisees concerning those requirements.

The 1973 legislation, referred to throughout this litigation as the California Automobile Franchise Act, or "the Act," created numerous new requirements affecting modification, replacement and termination of franchises delivery and preparation obligations of franchisees, and warranty reimbursement practices of franchisors. Most important to the instant case, the Act imposes specific procedural requirements upon a franchisor which seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area,[3] where the same

[2] California Vehicle Code sections 331.1 and 331.2, respectively, define "franchisee" and "franchisor" as follows:

"§331.1. A 'franchisee' is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.

§331.2. A 'franchisor' is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise."

[3] California Vehicle Code section 507 provides:

"The 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership."

line-make of motor vehicle is currently represented. Under the Act the franchisor is required to provide written notification to both the New Motor Vehicle Board and each franchisee in the relevant market area. Within fifteen days of receipt of the notification any franchisee entitled to notice may file with the Board a protest against the franchisor's intended action. Upon the filing of such protest, the Board is required to inform the franchisor that the protest has been filed, that a hearing is required to be held pursuant to specific provisions of the Act, and that the franchisor shall not establish or relocate the proposed dealership until the Board has held the required hearing, nor thereafter if the Board should determine that good cause exists for not permitting such dealership. (Cal. Veh. Code § 3062.)

Upon issuance of the foregoing notification, the Board must order a hearing to be held within 60 days from the date of that order and by copy thereof, must so notify the franchisor, the protesting franchisee, and all individuals or groups which have requested notification of protests and decisions of the Board. (Cal. Veh. Code § 3066 subd. (a).) The procedures under which the hearing is conducted are prescribed by reference to specific provisions of the California Administrative Procedure Act. (Cal. Gov. Code § 11500 et seq.) In protests against establishment or relocation of motor vehicle dealerships, the burden of proof is upon the franchisee to establish that good cause exists *not* to permit the proposed action of the franchisor.

(Cal. Veh. Code § 3066 subd. (b).)

The elements of proof which the protesting franchisee must establish are identified in California Vehicle Code section 3063, which provides:

> "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> "(1) Permanency of the investment.
>
> "(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> "(3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> "(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
>
> "(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

The decision of the Board must be in writing and must contain findings of fact and a determination of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the hearing officer's proposed decision, as the case may be. If the Board does not act within the requisite time, the

proposed action of the franchisor is deemed approved. (Cal. Veh. Code § 3067.)

General Motors Corporation, a franchisor under the terms of the Act, and two of its dealers in Southern California, filed a Complaint for Declaratory Relief and Injunction on April 13, 1976, seeking a declaration of the Act's unconstitutionality and an injunction restraining enforcement of the Act's provisions by the New Motor Vehicle Board, the Department of Motor Vehicles, the Department's director, and their respective agents. Among the plaintiffs' contentions was the allegation that the statutory procedure described above violated due process under the Fourteenth Amendment to the United States Constitution by "enjoining" proposed actions of manufacturers and their existing and potential franchisees without opportunity for a prompt hearing and decision on the merits of dealer protests and without requiring a showing of good cause prior to issuance of the "injunction." (Complaint, p. 4, ¶ 3(b).)

Because the suit sought to restrain state officers in the enforcement of a state statute, a three-judge court was convened under 28 U.S.C. §§ 2281 and 2284.

Appellant New Motor Vehicle Board filed a motion to dismiss the suit predicated in part on the ground that the doctrine of abstention under *Railroad Commission* v. *Pullman Company* (1941) 312 U.S. 946, required that exercise of federal jurisdiction be withheld. Plaintiffs thereafter filed a motion for partial summary judgment predicated in part upon the due process contentions

identified *supra*. Both motions were argued to the Court, after full briefing, on September 20, 1976.

On September 14, 1977, the District Court filed its opinion and judgment. The opinion (Exhibit A) held that the Act violated the Due Process Clause of the Fourteenth Amendment by depriving plaintiffs of liberty and property without prior notice and opportunity to be heard, and by failing to provide for a prompt hearing after the initial deprivation. The opinion rejected the Board's contention that the District Court should abstain from deciding the federal questions presented until unresolved issues of state law had been determined by the state courts. Following a conference with counsel, the Court on October 18, 1977, filed a corrected judgment denying the Board's motion to dismiss and granting plaintiffs-appellees' motion for partial summary judgment. The corrected judgment declared the relocation and establishment provisions of the Act unconstitutional for the reasons discussed in the opinion, and enjoined enforcement of those provisions of the Act by defendants.

THE QUESTIONS BEFORE THE COURT ARE SUBSTANTIAL

1. *A state regulatory statute does not violate due process of law merely because it mandates delay of proposed commercial activities pending state inquiry in the public interest, without requiring a hearing prior to or accompanying initial imposition of such delay.*

In holding the motor vehicle franchise relocation

and establishment provisions of California's Automobile Franchise Act a denial of due process, the District Court has transplanted into the sphere of commercial regulation a particular hearing requirement which this Court's previous teaching has confined to deprivations of recognized entitlements to property and individual liberties.

Without extended discussion of the rights of which plaintiffs are said to be denied the District Court declared, upon the basis of the hearing requirements held necessary in *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337 and *Fuentes* v. *Shevin* (1972) 407 U.S. 67, that the Automobile Franchise Act violates due process of law by failing to provide for a hearing before or while requiring plaintiffs to defer consummation of their commercial ventures pending inquiry by the New Motor Vehicle Board.

But the inchoate liberty interest which the District Court held to be curtailed, and the unidentified property interest of which plaintiffs are said to be deprived by the Act, are without constitutional status requiring recognition under the Fourteenth Amendment. As this Court has recently reiterated:

> "It is apparent from our decisions that there exist a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. *These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,* and we have repeatedly ruled that the

procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." *Paul* v. *Davis,* (1976) 424 U.S. 693, 710–711. Emphasis added.

Under these circumstances, the District Court's broad declaration that "*the plaintiffs had a constitutional right to do what they wanted to do,* subject only to the restrictions of due process herein discussed" (Exhibit A, p. 38, emphasis added) is truly startling in its departure from the repeated teaching of this Court, for, while determining the suit as a matter of non-final deprivation of protected rights, the District Court plainly recognized the gravamen of the issues tendered to be the delay to consummation of plaintiffs' business enterprises, occasioned by the State's regulatory function. (Exhibit A, pp. 33–35)

As a vindication of the "liberty" of business entities to proceed unfettered by delays attendant upon regulation, the District Court's opinion is plainly at war with this Court's consistent teaching of more than a generation. Since at least as early as this Court's decision in *Semler* v. *Oregon State Board of Dental Examiners* (1935) 294 U.S. 608, it has been established that state regulation of business, even when it constitutes an intrusion into the manner in which an individual may practice his profession, does not itself amount to "an arbitrary interference with liberty and property and thus violate the requirement of due process of law." (294 U.S. at 611.) Plaintiffs thus possess no right to be free from the regulatory hand of the

State. Indeed, so well settled is the foregoing proposition that in 1955, this Court held unequivocally that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted]" *Williamson* v. *Lee Optical of Oklahoma* (1955) 348 U.S. 483, 488 reh. den. 349 U.S. 925.

By engrafting onto the state's regulation of motor vehicle franchises the requirement of a prior hearing identified in the *Sniadach* line of decisions, the District Court has held in effect that the state must provide a hearing before it may make itself take the time to regulate. This Court has never countenanced that proposition. Indeed, it has long been established, in treating of regulatory measures enacted in aid of the public interest, that when a hearing is required under administrative procedures:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator of Wage & Hour Division* (1941) 312 U.S. 126, 152.

Even when the regulatory measure results in confiscation of tangible property, the rule is not otherwise. In *Ewing* v. *Mytinger & Casselberry, Inc.,* (1950) 339 U.S. 594 reh. den. 340 U.S. 857, this Court

elaborated upon the requirements of due process as they affect the timing of a hearing where administrative discretion, as opposed to ministerial adherence to the statutory requirement involved in the present case, was authorized. In addressing the discretion vested in an administrator to effectuate an outright seizure of property incident to commencement of judicial enforcement proceedings, this Court stated:

> "Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity and a judicial determination [Citations omitted]" 399 U.S. at 599.

Exactly how far the District Court's opinion has borne the requirement of a prior hearing from the logical limits of its legal origins is demonstrated by reference to *Fuentes* v. *Shevin, supra,* upon which the District Court explicitly relied. (Exhibit A, p. 36.) In *Fuentes, supra,* this Court specifically found that the Florida and Pennsylvania prejudgment replevin statutes which it invalidated served no important governmental or general public interest, permitting "summary seizure of a person's possessions when no more than private gain is directly at stake" 407 U.S. at 92. In *Fuentes,* moreover, the Court specifically acknowledged that when necessary to secure an important governmental or general public interest, even an outright seizure of property need not

necessarily be preceded by a hearing. (407 U.S. at 90–92; *see also, Calero-Toledo v Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 678–680.) In the present case, by contrast, the public interest served by the Automobile Franchise Act is unquestioned by the District Court; yet, on the assumption that a property interest *per se* is at stake in the delay imposed by regulation, the District Court, apparently without more, would require that a hearing on the merits of the proposed commercial enterprise precede the exercise of regulatory authority by the state.

Assuming that some cognizable property interest *is* substantially impaired by the operation of the Act, and that a hearing is thus required at *some* point before a final deprivation occurs, this Court's recent decision in *Mathews* v. *Eldridge* (1976) 424 U.S. 319 plainly demonstrates the inapplicability of the procedural requirement of a prior hearing to the degree of potential deprivation of property involved in this case. In *Eldridge, supra,* this Court, in reaffirming the necessity for some form of hearing before an individual is permanently deprived of a property interest, nonetheless refused to require an evidentiary adjudication of a disabled worker's right to continued disability benefits prior to discontinuation of such benefits by the Social Security Administration. (424 U.S. at 339–343.)

Professor Kenneth Culp Davis, in the 1977 supplement to *Administrative Law of the Seventies* (1976), has succinctly contrasted the key elements of

the *Eldridge* decision with those of this Court's earlier decision in *Goldberg* v. *Kelly* (1970) 397 U.S. 254, which, under the authority of *Sniadach, supra,* had required an evidentiary hearing to precede discontinuation of welfare benefits. With respect to the degree of potential deprivation as a determinant in the disparate results in the two decisions, Davis observes, in relevant part:

> ". . . In both Goldberg and Eldridge, the recipient of payments of public money was unquestionably entitled to an evidentiary hearing before *permanent* termination of the payments, and the question in both cases was whether payments could be terminated before such a hearing or only after such a hearing. The Goldberg case held that due process required opportunity for such a hearing before termination of payments under the program of aid to families of dependent children. The Eldridge case held that procedure short of an evidentiary hearing satisfied due process for terminating disability payments. *The main difference, but not the only difference, was that welfare payments may be "the very means by which to live," whereas disability payments, the Court said in Eldridge, are 'not based upon financial need.'* 424 U.S. at 340. . . ." (Davis, 1977 Supplement to *Administrative Law of the Seventies,* § 7.00-1-1, supplement pp. 84–85. Emphasis added.)

The District Court's opinion not only ignores the differences suggested by *Eldridge, supra,* between interests amounting to "the very means by which to live" and interests of other, lesser orders, but utterly

disregards the magnitude of interests at stake as a constitutional determinant of the nature and timing of such hearing as due process may require. As a result, the District Court's opinion requires that an evidentiary hearing precede all delay of commercial expectancies of motor vehicle franchisors, even though due process requires no such hearing before discontinuation of so fundamental an interest as monthly payments to a disabled worker.

If not reversed, the District Court's opinion and judgment will not constitute a merely anomalous legal curiosity, but will rather stand for the dubious doctrine that however necessary the State's regulation of a proposed commercial activity, a hearing must precede all delays which attend consummation of the business expectancy so regulated.

2. *The District Court was required, under this Court's decisions in Harris County Commissioners Court v. Moore (1975) 420 U.S. 77 and Bellotti v. Baird (1976) 428 U.S. 132, among others, to abstain from determining the federal issues tendered by plaintiffs' summary judgment motion.*

Notwithstanding the existence of issues of state law whose resolution in the State forum would at the very least substantially modify the federal issues dealt with by the District Court (*Bellotti, supra,* 428 U.S. at 147–148), the opinion below treated the question of abstention as one of deference to state courts for resolution of the *federal* issues presented (*Younger* v. *Harris* (1971) 401 U.S. 37), and declined to so defer

because no state court had yet dealt with those federal issues. (Exhibit A, pp. 38–39.) The District Court's consideration of the propriety of abstention under *Railroad Commission* v. *Pullman Company, supra,* (1941) 312 U.S. 946, was apparently limited to absence of ambiguities in the Act itself, thus ignoring the clear teaching of *Harris County Commissioners Court, supra,* that it is the existence of unsettled state law questions, not necessarily a statute ambiguous on its face, upon which the propriety of abstention depends. (420 U.S. at 86–88.)

The propriety of abstention does not depend upon whether or how a state court may decide the federal constitutional issue raised here. The dispositive question with which the Court has failed to treat, is whether action by the State judiciary may either (1) render exercise of federal jurisdiction unnecessary by resolving issues presented on the basis of state law or by a narrowing construction of the state statute, avoiding the necessity of litigation of federal issues, or (2) modify or define the federal issues here presented, so as to aid the federal forum in a subsequent exercise of jurisdiction. As this Court stated in ordering abstention in *Harris County Commissioners Court* v. *Moore, supra:*

> "Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. *If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal*

> *constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong.* (See Kusper v. Pontikes, 414 U. S. 51 (1973); Lake Carriers' Assn. v. MacMullan, supra; Harman v. Forssenius, 380 U. S. 528 (1965); Harrison v. NAACP, supra [360 U.S. 167 (1959)]." (420 U.S. at 84; emphasis and bracketed language added.)

In the court below, appellants demonstrated both a likelihood of a state court construction of the Act which would avoid necessity of a federal constitutional ruling and a likelihood that a state construction would substantially modify the federal issue presented here.

First, as appellants demonstrated in their Motion to Dismiss below, it is likely that the California courts may, as a matter of state law, imply a requirement of an evidentiary hearing in connection with issuance of the Board's notification to the franchisor under Vehicle Code section 3062, even though the statute itself makes no specific mention of a hearing for that purpose.

When a protest is filed against a proposed franchisor action under California Vehicle Code section 3062, appellant New Motor Vehicle Board is required to issue a written notification informing the franchisor that the proposed action is prohibited until a hearing is held and the protest determined. As discussed *supra,* because the District Court believed the prohibition and its attendant delay to constitute a deprivation of liberty and property, it held that the Act denies due process inasmuch as it contains no provision for a hearing prior to issuance of its notification under section 3062.

In dealing with a statute which similarly contained no explicit requirement for a hearing, the California Supreme Court in *Endler* v. *Schutzbank* (1968) 68 Cal.2d 162, required the State Commissioner of Corporations to "fashion" an appropriate hearing procedure for a private brokerage employee ordered discharged by the Commissioner. The Court observed that there was no question that the Commissioner had the power to provide for such a hearing under the governing statute. (68 Cal.2d at 182, fn.17.) Judge Warren Deering, a leading commentator on California administrative law, has observed that under such circumstances, "the decision in Endler v. Schutzbank (1968) 68 Cal.2d 162, . . ., indicates the courts will search the governing statute to find the necessary authority for the agency to provide a hearing. See also, Rios v. Cozens (1972) 7 Cal.3d 792, . . ., vacated and remanded (1973) 41 U.S.L.W. 3461, 93 S.Ct. 1019, 35 L.Ed 2d 398, reaffirmed, 9 Cal.3d 454, . . ." (Deering, *California Administrative Mandamus* (1977 Supp.), § 2.5, p. 7.)

The circumstances recognized by the California Supreme Court and identified by Judge Deering are present here. The Act provides the New Motor Vehicle Board the necessary power to afford parties a hearing prior to issuance of the Board's notification to the franchisor, should a state court imply the requirement of such hearing as a matter of state law. California Vehicle Code section 3067, through its incorporation by reference of the several provisions of the California

Administrative Procedure Act (Cal. Gov. Code § 11500 et seq.) provides the administrative blueprint for protest hearing procedure whenever such hearings are authorized. A determination that state law requires a hearing prior to issuance of the Board's notification would, of course, result in complete avoidance of the federal constitutional question involved in the instant decision. *Reetz* v. *Bozanich* (1970) 397 U.S. 82, 86–87.

Secondly, the Automobile Franchise Act additionally provides both the means and the statutory authority to afford parties an evidentiary hearing promptly after issuance of the Board's notification to the franchisor under section 3062, should such a hearing be deemed required. Assuming *arguendo* the correctness of the District Court's construction of section 3066, subdivision (a), as requiring the New Motor Vehicle Board to order a hearing concurrently with its issuance of notification to the franchisor, a protest hearing under the governing statute could be held as soon after promulgation of the order as a state court may hold is consistent with the requirements of due notice. For example, if a state court were to hold as a matter of state law that a hearing must occur within three days, five days, or ten days after issuance of the Board's notification to the franchisor, the constitutional question of the necessity of a *prior* evidentiary hearing may be either avoided, or substantially altered, by, among other things, the short duration of the delay considered in light of the substantiality of the private and public interests being affected. (See *Mathews* v.

Eldridge (1976) 424 U.S. 319, 332–335, 347–349.) Whether Board procedures afford an opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo* (1965) 380 U.S. 545, 552) would then be an issue subject to federal determination upon a basis "that is a complete product of the state, the enactment as phrased by its legislature and as construed by its highest court." (*Harrison* v. *N.A.A.C.P.* (1959) 360 U.S. 167, 178.)

Thirdly, a state court may construe the language of the Act as requiring the franchisor to give its franchisees and the Board advance notice of it proposed actions.

The Act requires that the franchisor notify its franchisees and the Board "in the event" that it proposes to relocate or establish a dealership (Cal. Veh. Code § 3062), but does not specify a point in time when such notification must be made. Thus, the franchisor at present enjoys exclusive control over the time when the Act's provisions commence to apply (Cal. Veh. Code § 3062). In the present case, as was pointed out to the District Court and to this Court on application for a stay of the judgment below, plaintiff General Motors issued the notice required by section 3062 only on the very day of its final approval of plaintiff Muller's relocation, even though the new proposed location had been known to both plaintiffs for several months. Likewise, plaintiff General Motors broached the subject of compliance with the Act to plaintiff Fox only on the eve of the latter's enfranchisement, then, after

securing Fox's full acceptance of all risks, deliberately ignored the franchisor notice requirement of the Act.

If a state court construction of the Act were explicitly to recognize that franchisors could time their notice of proposed action to occur, not necessarily "long before consumating their transactions" (Exhibit A, p. 37), but at some point prior to the proposed franchisee's first day of business, the determinants of the question whether a hearing is required prior to issuance of the Board's notification would "at least substantially change the nature of the problem" presented in plaintiffs' claim (*Harrison* v. *N.A.A.C.P.* (1959) 360 U.S. 167, 177) so as to render abstention appropriate. (*Bellotti* v. *Baird, supra,* 428 U.S. 132, 147–148.)

Any of the foregoing interpretations of the California statute could result from an authoritative state construction. Any one of the foregoing interpretations of the statute, if adopted by a state appellate court, would substantially alter the federal issue with which the District Court has dealt in this case.

This Court has additionally made it clear that the propriety of *Pullman*-type abstention is unimparied even by the absence of any extant state court construction based upon state law. Indeed it is specifically the existence of *unresolved* issues of state law which renders abstention a proper exercise of federal judicial restraint. (*Bellotti* v. *Baird, supra,* 428 U.S. 132 at 146–147.) In *Bellotti,* this Court ordered a three-judge district court to abstain from deciding the constitutionality of a Massachusetts statute requiring

parental consent for performance of an abortion on an unmarried woman under age eighteen. Rejecting the assertion that Massachusetts' highest court would inevitably construe the statute as the district court had, the court stated:

> "Whether the Supreme Judicial Court will so interpret the statute, or whether it will interpret the statute to require consideration of factors not mentioned above, imposed burdens more serious than those suggested, or create some unanticipated interference with the doctor-patient relationship, we cannot now determine.[16] Nor need we determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome. *It is sufficient that the statute is susceptible of the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would.* Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." (428 U.S. at 147–148. (Emphasis added; footnote omitted).)

Likewise, in *Harris County Commissioners Court* v. *Moore, supra,* this Court reversed a decision of a three-judge district court which had held a Texas redistricting statute a denial of equal protection. In the absence of a state judicial pronouncement upon unsettled relationships between the state constitution and the challenged statute, the Court held abstention appropriate and, "[i]n order to remove any possible

obstacles to state court jurisdiction," ordered the district court to dismiss the complaint. (420 U.S. at 88.)

Appellants in the present case have demonstrated the existence of three separate issues of state law, resolution of any one of which in a state construction of the statute would at the very least "substantially modify the federal constitutional challenge to the statute" (*Bellotti, supra,* 428 U.S. at 148.), if not obviate a federal constitutional ruling altogether, while preserving the statute in its present form.[4] As in *Bellotti, supra,* it is impossible to foretell the direction which an authoritative state construction may take, yet the clear teaching of *Bellotti* is that that direction need not be known to render abstention both prudent and proper.

CONCLUSION

The issues presented by this appeal arise from two areas of law to which this Court has recently given its careful consideration. The opinion and judgment which have issued from the learned three-judge court

---

[4] Previously, on application to this Court for a stay of the District Court's judgment, appellants have additionally pointed out the possibility that the state courts could themselves invalidate the Act on the basis of substantive challenges now pending in the California Court of Appeal for the Third Appellate District in *Toyota Motors Distributors* v. *State of California, et al.* (3d Civil No. 16429) and *Fresno Imports, Inc.* v. *State of California, et al.* (3d Civil No. 16430). Such a holding, resulting from application of state law to the issues of the propriety of the Act as an exercise of the State's police power and the validity of delegation of power by the legislature, would of course obviate a federal ruling on the adequacy of the Board's procedure under the Act. (*Reetz* v. *Bozanich, supra,* 397 U.S. at 86–87.)

in this case, and which touch most directly upon these two areas, are at radical variance with the principles reflected in the recent pronouncements of this Court. They are substantial questions which require this Court's attention.

Dated: DEC 9 - 1977

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the State of California

ROBERT L. MUKAI
Deputy Attorney General
Counsel for Appellant New Motor Vehicle Board of the State of California

STEPHEN J. EGAN
Deputy Attorney General
Counsel for Appellants Department of Motor Vehicles of the State of California, and Herman Sillas, Director of the Department of Motor Vehicles of the State of California

EXHIBIT A

FILED
September 14, 1977
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

MEMORANDUM OF DECISION

Before ELY, Circuit Judge, and
GRAY and TAKASUGI, District Judges
WILLIAM P. GRAY, District Judge.

Plaintiffs General Motors Corporation and two retail automobile dealers in Southern California seek of this three-judge court a declaratory summary judgment that the California Automobile Franchise Act is unconstitutional on its face and as administered, and they seek a consequent injunction. This court has

jurisdiction under 28 U.S.C. §§ 1331(a), 1337, 1343(3), and 2201. For reasons stated in this opinion, the requested relief will be granted.

The California governmental body now designated as the New Motor Vehicle Board (the Board) was created within the Department of Motor Vehicles by statute in 1967 and given responsibility for the licensing of new car dealers (California Vehicle Code §§ 3000 *et seq.*). In 1973, the California Automobile Franchise Act (the Act) added §§ 3060 to 3069 to the Vehicle Code, thereby giving the additional powers and functions to the Board that are challenged in this action.

Section 3062 provides that before an automobile manufacturer (franchisor) may establish an additional motor vehicle dealership (franchisee) or relocate an existing dealership, the franchisor must first give written notice of such intention to the Board and to each dealer for the same "line-make" of automobile within the "relevant market area." Such area is defined as ". . . any area within a radius of 10 miles from the site of a potential new dealership." (Vehicle Code § 507).

Any dealer receiving such notice may, within fifteen days thereafter, file with the Board a protest to the establishing or relocating of the dealership. When such a protest is filed, the Board is obliged automatically to issue an order to the franchisor that the proposed establishment or relocation of the franchisee may not take place pending a hearing on the merits of the protest and a final decision by the Board.

It is a misdemeanor for a franchisor to establish or relocate a franchisee in violation of an order of the Board (Vehicle Code §§ 11713.2(1) and 40000.11), and such violation is grounds for suspension or revocation of the license of a manufacturer or dealer to do business

in California (Vehicle Code § 11705(a)(10)).

Section 3066(a) provides that, "Upon receiving a notice of protest," the Board shall issue an order fixing a time for the hearing, which shall be commenced within sixty days following such order. As the foregoing describes, the receipt by the Board of a protest automatically triggers both the order staying the proposed action by the franchisor and the order setting the hearing. The statute does not specify clearly that the same communication shall contain both orders or, if not, when one shall be issued in relation to the other. Although in the present instance concerning plaintiff Orrin W. Fox Co., the Board waited six weeks after issuing the injunction (on May 29) before it sent out the order setting the hearing (on July 8), we are inclined to interpret the Act as requiring the injunction and the order to be promulgated concurrently.

The hearing may be conducted by the Board or by a hearing officer designated by the Board. Testimony of witnesses and documentary evidence may be presented by the parties, as well as by "other interested individuals and groups." (Vehicle Code § 3066(a)).

If the matter is heard by the Board and the Board fails to act within thirty days after such hearing, the proposed action is deemed to be approved (§ 3067). If the matter is heard by a hearing officer, he is required to prepare and submit in writing a proposed decision to the Board (Government Code § 11517(b)), and there is no time limit within which this must be accomplished. The Board may affirm or reverse the decision of the hearing officer, and, once again, if the Board does not act within thirty days, the proposed establishment or relocation of the franchisee is deemed approved (Vehicle Code § 3067). However, the Board may also decide to take additional evidence or refer the

matter back to the hearing officer for further proceedings (Government Code § 11517(c)), in which event there is no time limit imposed other than the requirement that the decision be made ". . . within such . . . period as may be necessitated . . ." by the additional proceedings (Vehicle Code § 3067).

Thus, by the simple means of filing a protest, an automobile dealer can prevent a new competitor from being established, or an existing competitor from being relocated in new facilities, within ten miles of the protesting dealer for at least ninety days plus as long as it may take for a hearing officer to submit in writing a proposed decision and for the accomplishment of such additional proceedings as the Board may direct. Plans to establish a dealership in a particular location necessarily involve commitments for the purchase or lease of real property, construction or alteration of premises, and for the acquiring of personnel, equipment and stock in trade. Bearing these things in mind, an actual or potential delay of three months, and perhaps much more, brought about by the filing of a protest could seriously hamper or even completely destroy the consummation of such plans.

Little imagination is needed in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probably success, irreparable injury if his protest is not granted, or a bond or any other undertaking.

The manner in which the passage of the Act and the administration thereof have affected the present plaintiffs is revealed in the uncontradicted affidavits and documentary exhibits submitted by the parties. The only Buick dealer in Pasadena terminated his

franchise early in 1974, and a replacement dealer had not been established until May 1975, when plaintiffs General Motors and Orrin W. Fox Co. executed a franchise agreement. Protests promptly were filed by Buick dealers located in the nearby cities of Monrovia and San Gabriel on about May 22, 1975. On May 29, 1975, the Board sent letters to General Motors advising of the protests and stating that "you may not . . . establish the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership." The letter also advised that the Board would later fix a time for the hearing and would advise accordingly. On July 8, 1975, the Board assigned the dates of August 11 and 12, 1975, for the hearing.

However, as the result of requests for continuance by the protestors and by stipulation, and protracted litigation in the courts concerning the right to take pre-hearing depositions, the protests were reset for hearing on September 15, 1976. They therefore were still pending when the present action was filed, on April 13, 1976.

The foregoing recital shows that, under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay.

Plaintiff Muller Chevrolet took over an existing

dealership in the Montrose section of Glendale in 1973. It soon became apparent to Muller that its physical facilities were completely inadequate and rapidly deteriorating and that a move to a new and much larger location was mandatory. In December 1974, Mr. Muller learned that the location of the current Volkswagen dealership in the adjacent community of La Canada might become available. Negotiations were begun that were contingent upon the Volkswagen dealer finding a new site for his operation, and upon the ability of the parties to finance their respective moves. After a year of complex and time consuming negotiations, an agreement was reached in December 1975 and the required notice of intention to relocate was served upon the Board and the surrounding Chevrolet dealers on about January 16, 1976. A few days later, Chevrolet dealers in Pasadena and Tujunga, respectively, filed with the Board letters saying, in effect, no more than "I protest," and on February 6, 1976, the Board responded by enjoining the proposed relocation pending a hearing on the protests. About two weeks later, on February 23, 1976, the Board "tentatively" set the hearing for June 23 through 25, 1976, and on April 21, 1976, issued a formal order confirming those dates. It is worthy of note here that such hearing was scheduled for a time more than four months after the injunction had been issued.

It appears from a supplemental affidavit filed by Mr. Muller on September 17, 1976, that the scheduled hearing took place before a hearing officer and that the latter rendered a decision favorable to the proposed relocation on about August 20, 1976. Then began the thirty-day waiting period within which time the Board might act upon that decision before the proposed relocation could be deemed approved and the

injunction finally lifted (Vehicle Code § 3067). On September 14, 1976, before the end of such waiting period, Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon "gave up" with respect to this litigation and is starting all over again in his attempt to find a new site for his business.

We find that the hereinabove described procedures mandated by the California statute are in gross violation of the Due Process Clause of the Fourteenth Amendment. As the Supreme Court has said, the right to the liberty proclaimed by that provision of the Constitution ". . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Certainly, the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another are included within this protection. Of course, the right to do these things is not unlimited. Legitimate conflicting interests of other individuals and of the public as a whole often require that restrictions be imposed. The Fourteenth Amendment requires only that such restrictions be administered in accordance with the procedural safeguards that have been established over the years as constituting due process of law.

One of the basic requirements of due process is that the "liberty" of a person may be curtailed only after a hearing. *Sniadach v. Family Finance Corp.,* 395 U.S. 337

(1969); *see, Mullane v. Central Hanover Bank,* 339 U.S. 306, 313 (1950).

> "[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.
>
> * * *
>
> The Fourteenth Amendment draws no bright lines around 3-day, 10-day, or 50-day deprivations of property. . . . While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Fuentes v. Shevin,* 407 U.S. 67, 84–86 (1972).

Here, the plaintiffs were deprived of their rights for many months without any hearing whatever.

It is true, as the defendants point out, that there are extraordinary situations in which some valid governmental interest is at stake that justifies immediate interference with the rights of a person before a noticed hearing can be accomplished. For example, the Supreme Court has upheld statutes permitting governmental agencies summarily to seize operational control of banking institutions in serious financial difficulty. *Fahey v. Mallonee,* 332 U.S. 245 (1947). *See also, Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950), in which a procedure for summary seizure of misbranded drugs by the Food and Drug Administration was upheld. But such procedures are justified only when a responsible public official concludes that to delay action pending a hearing would likely result in serious harm to the public. Here, there is no provision in the Act for any public official to

exercise his discretion as to whether the public interest requires that immediate action by taken in advance of a hearing; instead, the injunction automatically follows a simple protest by a competitor.

There are, of course, instances in which concepts of due process will also permit private parties to obtain judicial orders that restrain their adversaries from taking actions pending a hearing to determine whether the challenged actions should be enjoined as being in violation of the legitimate interests of the complainants. But the party seeking such a restraining order must make a persuasive showing that to delay injunctive relief until after a hearing would result in irreparable injury to him, and that he would be likely to prevail in such hearing. Even with such a showing, a pre-hearing restraining order is normally limited to ten days. *See,* for example, Rule 65(b) of the Federal Rules of Civil Procedure. There is also the normal requirement of a bond to insure the enjoined party against loss occasioned by an improvidently issued restraining order. None of these requirements of due process are provided for in the Act.

The defendants urge that the Act is not constitutionally defective in its operation because the plaintiffs could have filed and circulated their notices of intention early in their negotiations, and long before consummating their transactions, thus shortening or perhaps avoiding the delay between readiness to operate and the hearing. In the case of Muller, it appears that the negotiations for the lease of the new premises were protracted and involved many problems that were uncertain of satisfactory solution. It would hardly have been practicable for Muller to publish an intention to relocate, thus inspiring almost inevitable protest, and go through an expensive

hearing without knowing that the desired premises were available. It is also not hard to imagine the dampening effect upon the negotiations that would be imposed by the awareness of the long delay in completion of the transaction that any irresponsible protest could inherently cause.

Apart from these practical considerations, the short answer to the defendants' contention is that the plaintiffs had a constitutional right to do what they wanted to do, subject only to the restrictions of due process herein discussed.

In light of the foregoing, it is evident to us that the Act is unconstitutional as being in violation of the Due Process Clause of the Fourteenth Amendment. Having upheld the plaintiffs' challenge on this ground, it is unnecessary for us to consider their alternative claim that the Act is invalid under the Supremacy Clause of the Constitution because it is in inherent conflict with the federal antitrust laws.

However, before rendering a judgment for the plaintiffs, we must resolve an additional problem that has been troubling us from the inception of this action, namely, whether or not principles of comity require, or even permit, that we abstain from adjudicating this matter. We are fully mindful of the teaching of Justice Black, in *Younger v. Harris,* 401 U.S. 37, 44 (1971), that the notion of comity denotes ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." We are in complete accord with this concept, and we are aware that the courts of California are just as dedicated to preserving

the principles of the United States Constitution as are we. Our decision in this matter has been withheld for several months in the hope that one of the cases pending against the Board in state courts would result in an adjudication that would deal with the constitutional problem here presented. However, this has not occurred,* and we are obliged to act, particularly in light of the rule laid down in *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971):

> ". . . abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal courts should not abstain but should proceed to decide the federal constitutional claim. . . . We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it."

As is discussed above, we find the Act to be clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process. Accordingly, a judgment declaring such unconstitutionality and enjoining enforcement of the provisions of the Act pertaining to

---

* On May 23, 1977, the California Court of Appeal (Third District) affirmed a trial court ruling that the Act was unconsitutional because four of the nine members of the Board are required to be new car dealers, and thus presumably antagonistic to franchisors. *American Motors Sales Corp. v. New Motor Vehicle Board,* 69 C.A. 3d 983 (1977). The Legislature and the Governor promptly responded by enacting (on June 24, 1977) and approving (on July 7, 1977), an amendment to the Act which provides that only the non-new car dealer members of the Board may decide matters involving protests. The amendment made no other change in the procedures established by the Act.

protest procdure is being filed contemporaneously herewith. This opinion shall constitute findings of fact and conclusions of law, as authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: September 14, 1977.

WILLIAM P. GRAY
United States District Judge

EXHIBIT B

FILED
Sep 14 1977
Clerk, U. S. District Court
Central District of California
By _____ Deputy

Entered
Sep 15 1977
Clerk, U. S. District Court
Central District of California
By _____Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

SUMMARY JUDGMENT

The motion of plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation has been submitted for decision by this three-judge court after having been briefed and orally argued. In accordance with the Memorandum of Decision being filed contemporaneously herewith, and the court having found that there is no just reason for delay in the entry of judgment,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060–69) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving motor vehicle manufacturers and their prospective and existing dealers of liberty and property without prior notice and the opportunity to be heard.

2. The California Automobile Franchise Act violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide for a prompt hearing on the merits following the initial peremptory deprivation of liberty and property.

3. Defendants, their agents, and any persons acting on their behalf, at their direction or under their control are hereby enjoined from taking any action to implement or enforce the Act's provisions.

4. Plaintiffs shall recover their costs herein in the amount of $_____.

DATED: September 14, 1977.

WALTER ELY
United States Circuit Judge

WILLIAM P. GRAY
United States District Judge

ROBERT M. TAKASUGI
United States District Judge

EXHIBIT C

FILED
Oct 13 3:52 PM '77
Clerk U.S. District Court
Central Dist. of Calif.
By _____

EVELLE J. YOUNGER, Attorney General
of the State of California
ROBERT L. MUKAI,
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-5448

Attorneys for Defendants
NEW MOTOR VEHICLE BOARD, JACABAN,
JONES, BARNES, ONESIAN, TUTTLE,
VANDENBERG and JENNINGS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 76 1200 WPG

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that defendant New Motor Vehicle Board of the State of California hereby appeals to the Supreme Court of the United States from the judgment entered upon the docket of this Court in the above-entitled cause on September 15, 1977, as subsequently corrected pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED: October 13, 1977.

EVELLE J. YOUNGER
Attorney General

ROBERT L. MUKAI
Deputy Attorney General

By _____
ROBERT L. MUKAI
Deputy Attorney General
Attorneys for Defendants

EXHIBIT D

FILED
Oct 13 10:28 AM '77
Clerk U.S. District Court
Central Dist. of Calif.
By _____

EVELLE J. YOUNGER,
Attorney General of the
State of California
STEPHEN J. EGAN,
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-1113
Attorneys for Defendants, Department of
Motor Vehicles of the State of California
and Herman Sillas as Director of the
Department of Motor Vehicles

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

Please take notice that the defendants, Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles hereby appeal to the Supreme Court of the United States from that certain partial summary judgment entered on September 14, 1977, as amended, and from all parts of said partial summary judgment.

DATED: October 14, 1977.

EVELLE J. YOUNGER
Attorney General of the State of California

STEPHEN J. EGAN
Deputy Attorney General

By _____
STEPHEN J. EGAN

EXHIBIT E

FILED
Oct 18 1977
Clerk, U.S. District Court
Central District of California
By _____

ENTERED
Oct 19 1977
Clerk, U.S. District Court
Central District of California
BY _____

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

PARTIAL SUMMARY JUDGMENT

The Court on its own motion pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, after conferring with counsel, hereby corrects the Summary Judgment entered September 15, 1977, by substituting therefor this Partial Summary Judgment.

Plaintiffs' motion for partial summary judgment and defendants' motion to dismiss have been submitted for decision after having been briefed and orally argued. In accordance with the Memorandum of Decision filed September 14, 1977, plaintiffs' motion for partial summary judgment is granted and defendants' motion to dismiss is denied.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and expressly directs the entry of a final judgment on plaintiffs' claim contained in Paragraphs 23 through 27 of the Complaint concerning the constitutionality of those provisions of the California Automobile Franchise Act which relate to the establishment and relocation of franchised motor vehicle dealerships. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060–69), insofar as its provisions relate to the establishment and relocation of franchised motor vehicle dealerships, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving motor vehicle manufacturers and their prospective and existing dealers of liberty and property without prior notice and the opportunity to be heard.

2. The California Automobile Franchise Act, insofar as its provisions relate to the establishment and relocation of franchised motor vehicle dealerships, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide for a prompt hearing on the merits following the initial peremptory deprivation of liberty

and property.

3. Defendants, their agents, and any persons acting on their behalf, at their direction or under their control are hereby enjoined from taking any action to implement or enforce the Act's provisions that relate to the establishment and relocation of franchised motor vehicle dealerships.

4. Plaintiffs shall recover their costs herein in the amount of $_____.

DATED: Oct. 18, 1977.

WALTER ELY
United States Circuit Judge

WILLIAM P. GRAY
United States District Judge

ROBERT M. TAKASUGI
United States District Judge

APPROVED AS TO FORM:

O'MELVENY & MYERS
GIRARD E. BOUDREAU, JR.
JOHN G. NILES

Attorneys for Plaintiff General Motors Corporation

By _____
Girard E. Boudreau, Jr.

HAHN & HAHN

Attorneys for Plaintiff Orrin W. Fox Co.

By _____
George R. Baffa

NORIN T. GRANCELL
A Professional Corporation

Attorney for Plaintiff Muller Chevrolet

By _____
Norin T. Grancell

EVELLE J. YOUNGER,
Attorney General of the State of California
ROBERT L. MUKAI, Deputy Attorney General

Attorneys for Defendants New Motor Vehicle Board, Jacaban, Jones, Barnes, Onesian, Tuttle, Vandenberg and Jennings

By _____
Robert L. Mukai

EVELLE J. YOUNGER,
Attorney General of the State of California
STEPHEN J. EGAN, Deputy Attorney General

Attorneys for Defendants Department of Motor Vehicles and Herman Sillas

By _____
Stephen J. Egan

CROW, LYTLE & GILWEE
RICHARD E. CROW

Attorneys for Intervening Defendants Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California

By _____
Richard E. Crow

By _____
Richard E. Crow

EXHIBIT F

FILED
Nov 17 10 06 AM '77
Clerk U.S. District Court
Central Dist. Of Calif

EVELLE J. YOUNGER,
Attorney General of the State of California
STEPHEN J. EGAN,
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-1113

Attorneys for Defendants, Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

Please take notice that the defendants, Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles hereby appeal to the Supreme Court of the United States from that certain partial summary judgment entered on October 19, 1977, as amended, and from all parts of said partial summary judgment.

Dated: November 14, 1977.

EVELLE J. YOUNGER,
Attorney General of the
State of California

STEPHEN J. EGAN,
Deputy Attorney General

By _____
Stephen J. Egan

EXHIBIT G

FILED
Nov 21 1977

EVELLE J. YOUNGER,
Attorney General of the State of California
ROBERT L. MUKAI
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-5448

Attorneys for Defendants
NEW MOTOR VEHICLE BOARD, JACABAN, JONES, BARNES, ONESIAN, TUTTLE, VANDENBERG and JENNINGS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG
[THREE-JUDGE COURT]

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that defendant New Motor Vehicle Board of the State of California hereby appeals to the Supreme Court of the United States from that certain partial summary judgment filed herein on October 18, 1977, and entered upon the docket of this Court in the above-entitled cause on October 19, 1977, and from the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: November 17, 1977.

EVELLE J. YOUNGER
Attorney General
ROBERT L. MUKAI
Deputy Attorney General

By ROBERT L. MUKAI

ROBERT L. MUKAI
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board

EXHIBIT H

EXHIBIT H

CALIFORNIA AUTOMOBILE FRANCHISE ACT

(California Vehicle Code §§ 3060–3069)

Article 4.

3060. Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has

been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

3061. In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

3062. In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to locate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed

dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

NOTE

Section 3062 was amended during the 1977 legislative session, effective January 1, 1978, to exclude from its operation "any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located." (Cal.Stats. 1977, ch. 880 § 1.)

Good Cause

3063. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area

which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

3064. (a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of such franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on such schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, providing a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification

that he has fulfilled these obligations.

3065. (a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this

section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

3066. (a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer, designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515 and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicles dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

NOTE

Section 3066 was amended during the 1977 legislative session, effective July 8, 1977, to add new subdivision (d), which provides as follows:

"(d) No member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a protest filed pursuant to this article." (Cal.Stats. 1977 ch. 278 § 3.)

3067. The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

3068. Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail.

3069. The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches,

distributors and distributor branches at the time of its enactment and to all such future franchises.

O

FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al., DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX CO., et al.,
Appellees.

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al.,
Appellants,

vs.

ORRIN W. FOX CO., et al.,
Appellees.

On Appeal from the United States District Court for the Central District of California

Jurisdictional Statement Filed December 6, 1977 10-12,

Probable Jurisdiction Noted and Cases Consolidated February 21, 1978

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Index

		Page
1.	Complaint for Declaratory Relief and Injunction—April 13, 1976	1
2.	Summons	82
3.	Defendant New Motor Vehicle Board's Notice of Motion and Motion to Dismiss Action and Memorandum in Support of Motion to Dismiss—May 6, 1976	85
4.	Defendant Department of Motor Vehicles' Answer to Complaint—May 6, 1976	101
5.	Plaintiffs' Notice of Motion for Partial Summary Judgment and Memorandum of Points and Authorities—June 7, 1976	104
6.	Plaintiffs' Affidavits in Support of Motion for Partial Summary Judgment:	
	Richard L. Fox	
	John Muller	
	John G. Niles—June 8, 1976	137
	James G. McCullough—June 8, 1976	152
	Gordon S. Robinson—June 8, 1976	154
7.	Defendant New Motor Vehicle Board's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment—August 5, 1976	159
8.	Defendants' Reply Memorandum in Support of Motion to Dismiss—August 5, 1976	226
9.	Notice of Joinder of Defendant Department of Motor Vehicles et al. in Motion to Dismiss—August 13, 1976	230
10.	Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment—August 18, 1976	232
11.	Plaintiffs' Reply to Intervenors' Antitrust and Abstention Arguments—August 19, 1976	272
12.	Supplemental Affidavit of John Muller—September 17, 1976	285
13.	Order, U.S. Supreme Court—December 6, 1977	289

		Appellant's Jurisdictional Statement
14.	Memorandum of Decision—Sept. 14, 1977	Ex. A p. 29
15.	Summary Judgment—Sept. 14, 1977	Ex. B p. 43
16.	Notice of Appeal, NMVB—Oct. 13, 1977	Ex. C p. 47
17.	Notice of Appeal, DMV—Oct. 13, 1977	Ex. D p. 51
18.	Partial Summary Judgment—Oct. 18, 1977	Ex. E p. 53
19.	Notice of Appeal—Nov. 17, 1977	Ex. F p. 61
20.	Notice of Appeal—Nov. 21, 1977	Ex. G p. 65
21.	California Automobile Franchise Act	Ex. H p. 69

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-837
NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al., DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA,
Appellants,
vs.
ORRIN W. FOX CO., et al.,
Appellees.

No. 77-849
NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al.,
Appellants,
vs.
ORRIN W. FOX CO., et al.,
Appellees.

On Appeal from the United States District Court for the Central District of California

United States District Court
Central District of California

No. 76 1200 LTL

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants.

[Filed Apr. 13, 1976]

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION

(Three-Judge Court)

Plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation, for claims for relief, allege the following:

NATURE OF THE CASE

1. This is an action to declare unconstitutional and void and to enjoin the enforcement of Sections 3060 through 3069 inclusive of the Vehicle Code of the State of California, hereafter referred to as the "Automobile Franchise Act" or the "Act." The Automobile Franchise Act was enacted by the California Legislature as Stats. 1973, Ch. 996 § 16, as amended by Stats. 1974, Ch. 384 § 3, was approved by the Governor on October 1, 1973, and became effective on July 1, 1974. The Act is unconstitutional both on its face and as administered.

2. Notwithstanding the terms of any franchise agreement, the Automobile Franchise Act purports to regulate the termination or modification of franchise agreements between motor vehicle manufacturers and motor vehicle dealers, as well as the establishment of newly franchised motor vehicle dealerships and the relocation of existing franchised motor vehicle dealerships. In general, the Act requires manufacturers to give the New Motor Vehicle Board (hereafter the "Board") and franchisees of the "same line-make" located within a ten-mile radius of the affected dealership written advance notice of intent to do any of these acts (with the exception of termination where notice only to the terminated dealer and the Board is required). Within a stated period of time after receiving such a notice, a franchisee may protest the proposed action to the Board. If a protest is filed, the Board is required by statute automatically and without hearing to issue an order enjoining the pro-

posed action until such time as a hearing on the merits of the protest has been had and a final determination has been made. In practice such injunction orders are made by the Executive Secretary of the Board as a matter of course and, because of the Board's position that it has complete discretion as to the time within which it must set matters for hearing, either before the Board or a hearing officer designated by the Board, the injunctive orders are of indefinite duration. The conduct of the hearing on the merits, rendition of the Board's decision and appellate review thereof are governed by other provisions of the Act. Various of the Act's provisions are described in greater detail in succeeding sections of this Complaint, and a copy of the Act as presently in force is attached hereto as Exhibit A for the Court's convenience.

3. The Automobile Franchise Act is unconstitutional for the following reasons, each of which will be described in greater detail in succeeding sections of this Complaint:

(a) The Automobile Franchise Act does not afford manufacturers a hearing before an impartial tribunal and therefore violates the Due Process and Equal Protection Clauses (Section 1) of the Fourteenth Amendment to the United States Constitution.

(b) The New Motor Vehicle Board's enjoining of the described proposed action by manufacturers and their existing and potential franchisees without the opportunity for a prompt

hearing and decision on the merits of dealer protests and without requiring any showing of good cause on the part of the protesting dealer prior to the issuance of injunctive orders deprives manufacturers and their existing and potential franchisees of property and protected constitutional rights without due process of law, in violation of the Fourteenth Amendment.

(c) Under the Act, as administered, there is a significant and protracted period of delay between the time of the initial filing of a protest, followed automatically by the injunctive action of the Board, and any subsequent hearing and final decision on the merits, which results in a denial of property and protected constitutional rights of manufacturers and their existing and potential franchisees without due process of law, in violation of the Fourteenth Amendment.

(d) The Automobile Franchise Act is inconsistent with and in direct contravention of the national economic policy reflected in the federal antitrust laws (15 U.S.C. §§ 1-7, 12-27), and is therefore invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

(e) Under the Act, existing and potential franchisees whose interests are directly affected by the Board's injunctive order are denied the right to participate in protest proceedings involving the establishment or relocation of their franchises, and are denied the opportunity to be

heard and present evidence on their own behalf. The Automobile Franchise Act therefore violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(f) The Automobile Franchise Act denies both due process and equal protection of the law in violation of the Fourteenth Amendment since there is no compelling state interest sufficient to justify the Act's impact on constitutionally protected rights.

(g) To the extent that its provisions purport to apply to franchises already in existence on the date of its enactment, the Automobile Franchise Act impairs the obligation of contracts in violation of the Contracts Clause of the United States Constitution (Article I, Section 10).

(h) The Automobile Franchise Act imposes an undue burden on interstate commerce and thereby conflicts with federal power under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) to regulate such commerce.

JURISDICTION AND VENUE

4. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331(a), 1337 and 1343(3). The matter in controversy exceeds $10,000.00, exclusive of interest and costs. This action presents an actual case or controversy appropriate for declaratory relief pursuant to 28 U.S.C. § 2201.

5. This action seeks injunctive relief against the enforcement of a state statute on the ground that it is unconstitutional, and therefore the action must be heard and determined by a three-judge court pursuant to 28 U.S.C. § 2281.

6. The venue of this action is in the Central District of California pursuant to 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Orrin W. Fox Co. (hereafter "Fox") is a California corporation doing business as a dealer for new and used automobiles and trucks at 3456 East Colorado Boulevard, Pasadena, California. Fox holds franchises from American Motors Sales Corporation for American Motors automobiles and from the GMC Truck & Coach Division of General Motors Corporation for the full line of GMC trucks. Fox is a "franchisee" and "new car dealer" within the meaning of California Vehicle Code, Sections 331.1 and 426, respectively.

8. Plaintiff Muller Chevrolet (hereafter "Muller") is a California corporation doing business as a dealer for new and used automobiles and trucks at 3701 Oceanview Boulevard, Montrose, California. Muller holds a franchise from the Chevrolet Division of General Motors for Chevrolet automobiles and trucks. Muller is a "franchisee" and "new car dealer" within the meaning of California Vehicle Code, Sections 331.1 and 426, respectively.

9. Plaintiff General Motors Corporation is a Delaware corporation with its principal place of business

in Michigan. General Motors manufactures and sells motor vehicles and motor vehicle parts and accessories throughout the United States. These products are manufactured and assembled in various parts of the United States and in large part are sold and shipped by General Motors in interstate commerce throughout the United States, including states other than the state of manufacture. In the Central District of California, General Motors operates motor vehicle assembly plants in Van Nuys and South Gate, California, and General Motors sells motor vehicles and motor vehicle parts and accessories to numerous franchised dealers which are themselves located and doing business in the Central District. General Motors is a "franchisor" and "manufacturer" within the meaning of California Vehicle Code §§ 331.2 and 388, respectively.

10. Defendant New Motor Vehicle Board is an agency of the State of California, within the Department of Motor Vehicles. The Board is, *inter alia*, charged with the responsibility for administering the Automobile Franchise Act pursuant to § 3050(b) of the California Vehicle Code. Defendants Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg are the current, duly-appointed members of the Board and are sued herein in that capacity. Three seats on the Board are now vacant. Defendant Sam W. Jennings is and at all times material hereto has been the Executive Secretary of the Board and is sued herein in that capacity.

11. Defendant Department of Motor Vehicles (hereafter "Department") is an agency of the State

of California, within the Business and Transportation Agency. Defendant Herman Sillas is the current Director of the Department and is sued herein in that capacity. The Department and the Director are charged with the responsibility of administering and enforcing the provisions of the California Vehicle Code.

RELATED ADMINISTRATIVE PROCEEDINGS

12. General Motors is currently a party to the following Automobile Franchise Act proceedings pending before the New Motor Vehicle Board:

(a) *Becherer Buick, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-35-75 and PR-50-75), filed on or about May 22, 1975 and August 6, 1975, respectively.

(b) *O'Donnell Buick-Opel, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-36-75 and PR-51-75), filed on or about May 22, 1975 and August 6, 1975, respectively.

(c) *Service Oldsmobile-GMC, Inc., et al. v. General Motors Corporation (Oldsmobile Division, Truck & Coach Division)* (Protest No. PR-37-75), filed on or about May 16, 1975.

(d) *Jack Wall Chevrolet, Inc. v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-87-76), filed on or about January 22, 1976.

(e) *Fred Bell Chevrolet v. Chevrolet Motor Division, General Motors Corporation* (Protest

No. PR-88-76), filed on or about January 21, 1976.

13. The *Becherer Buick* and *O'Donnell Buick-Opel* cases (hereafter collectively referred to as the "Pasadena Cases") are protests by franchised Buick-Opel dealers located in Monrovia and San Gabriel, California, respectively, against the granting of Buick and Opel franchises to plaintiff Fox in Pasadena. Although Fox is not a party to the Pasadena Cases (because the Automobile Franchise Act contains no provision for participation in protest proceedings by potential franchisees), Fox's economic and commercial interests are directly affected by those proceedings.

14. The Pasadena Cases arose in the following manner: In March 1974 Buick's franchised dealer in Pasadena, Walter Klock Buick, went out of business following personal and financial difficulties. General Motors immediately began to seek a replacement dealer and ultimately decided to offer Buick and Opel franchises to Fox. Since the Fox dealership was to be a replacement for Walter Klock Buick and not an additional dealership, and since Section 3062 of the California Vehicle Code had not at that time been construed by the New Motor Vehicle Board or any court, General Motors wrote the Board to advise of its intention to grant Buick and Opel franchises to Fox, and to ask if Buick-Opel dealers within 10 miles of the Fox dealership should be given notice under Section 3062. The Board declined to answer this inquiry. Without further notice, General Motors and

Fox entered into franchise agreements for Buick and Opel automobiles on May 2, 1975, and Fox commenced the sale of Buick and Opel automobiles. Thereafter, Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc. filed protests with the New Motor Vehicle Board against the granting of Buick and Opel franchises to Fox. (Copies of protest letters are annexed hereto as Exhibits B and C.) By letters dated May 29, 1975 the Board ordered General Motors not to grant Buick and Opel franchises to Fox and enjoined General Motors and Fox from engaging in the business contemplated by the franchises pending a hearing on and determination of those protests. (Copies of the Board's injunction letters are annexed hereto as Exhibits D and E.)

15. Both General Motors and Fox were advised by the Department of Motor Vehicles that any violation of the Board's injunctive orders would result in disciplinary action by the Department which could include the suspension or revocation of General Motors' license to do business as a motor vehicle manufacturer in California and Fox's license to do business as a new and used car and truck dealer. (A copy of the Department's letter to Fox is annexed hereto as Exhibit F.) Under the threat of such disciplinary action General Motors immediately ceased to supply Buick and Opel automobiles to Fox, and Fox immediately ceased the sale of such automobiles. Despite vigorous efforts by General Motors during the past year to bring the Pasadena Cases to a hearing before the New Motor Vehicle Board, no hearing has been held and none is now scheduled.

16. The *Service Oldsmobile-GMC, Inc.* case is a protest against the termination of Service Oldsmobile's franchises from General Motors for the sale of Oldsmobile cars and GMC trucks and motor homes at a dealership located at 3555 East South Street, Long Beach, California. Service Oldsmobile became insolvent and went out of business in February 1975. Because of this, in April 1975 General Motors served notice of franchise termination on Service Oldsmobile. Despite the fact it was no longer in business, Service Oldsmobile protested the termination of its franchises to the New Motor Vehicle Board, and by letter dated May 23, 1975 the Board ordered General Motors not to terminate those franchises pending a hearing on and determination of Service Oldsmobile's protest. (Copies of the protest letter and the Board's injunction letter are annexed hereto as Exhibits G and H.) A hearing before a hearing officer designated by the Board has been scheduled in Los Angeles for June 14-18, 1976.

17. The *Jack Wall Chevrolet, Inc.* and *Fred Bell Chevrolet* cases (hereinafter collectively referred to as the "La Canada Cases") are protests by franchised Chevrolet dealers located in Pasadena and Tujunga, California, respectively, against the relocation of Muller Chevrolet from 3701 Oceanview Boulevard, Montrose, California to 475 Foothill Boulevard, La Canada, California. Although Muller is not a party to the La Canada cases (because the Automobile Franchise Act contains no provision for participation in protest proceedings by the relocating franchisee),

Muller's economic and commercial interests are directly affected by those proceedings. In January 1976, General Motors gave notice of the proposed relocation of Muller Chevrolet to the New Motor Vehicle Board and all existing Chevrolet franchisees located within 10 miles of 475 Foothill Boulevard in La Canada. Jack Wall Chevrolet, Inc. and Fred Bell Chevrolet filed protests with the New Motor Vehicle Board, and by letters dated February 6, 1976 the New Motor Vehicle Board ordered General Motors not to go forward with the proposed relocation pending a hearing on and determination of the Bell and Wall protests. (Copies of the protest and injunction letters are annexed hereto as Exhibits I, J, K and L.) A hearing before a hearing officer designated by the Board has been scheduled in Los Angeles for June 21-25, 1976.

FAILURE TO PROVIDE IMPARTIAL TRIBUNAL

18. The Automobile Franchise Act does not afford motor vehicle manufacturers a hearing before an impartial tribunal, and therefore violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

19. The composition of the New Motor Vehicle Board is established by Vehicle Code § 3000, which provides that the Board shall consist of nine members, and Vehicle Code § 3001, which states:

> "Four of the appointive members of the board shall be new car dealers as defined in Section 426 who have engaged for a period of not less than five years preceding their appointment in [the motor vehicle business]. Such members shall be appointed by the Governor.
>
> Each of the five remaining appointive members shall be a public member who is not [engaged in the motor vehicle business in any capacity] at the time of such appointment and one of such five appointive members shall have been admitted to practice law in the state for at least 10 years immediately preceding his appointment. One public member shall be appointed by the Senate Rules Committee, one by the Speaker of the Assembly, and three by the Governor.
>
> Each member shall be of good moral character."

20. When the protests in the Pasadena Cases were first filed (May 22, 1975) and the Board issued its order prohibiting General Motors from granting Buick and Opel franchises to Fox (May 29, 1975) the Board was composed of the following duly-appointed members:

> Robert A. Smith, a new car dealer and franchisee doing business as Bob Smith VW-Porsche at 1750 North Cahuenga Boulevard, Hollywood, California.
>
> Pascal B. Dilday, a new car dealer and franchisee doing business as Pascal Dilday Lincoln-Mercury at 1276 University Avenue, San Diego, California.
>
> John D. Barnes, a new car dealer and franchisee doing business as Jack Barnes Pontiac at 999 North Oxnard Boulevard, Oxnard, California.

John B. Vandenberg, a new car dealer and franchisee doing business as Vandenberg Motors, 1125 Alhambra Boulevard, Sacramento, California.

Melicio H. Jacaban, a newspaper publisher.

Audrey B. Jones, an attorney.

John Onesian, an attorney.

Winfield J. Tuttle, retired.

Thomas Kallay, an attorney.

21. The terms of office of Board members Kallay, Smith and Dilday expired on January 15, 1975, and those members ceased to hold office on July 15, 1975 pursuant to Vehicle Code § 3003. No successor members have been appointed.

22. The New Motor Vehicle Board as constituted prior to July 15, 1975 and at all times material hereto was not and is not an impartial tribunal. Each member of the Board who is also a new car dealer and franchisee has a direct pecuniary interest in the outcome of Automobile Franchise Act protest proceedings before the Board. The Board's decision in such cases will create statewide standards governing the establishment, relocation, modification and termination of motor vehicle franchises, including the franchises held by dealer members of the Board.

FAILURE TO AFFORD PROMPT HEARING

23. The New Motor Vehicle Board's enjoining of the described proposed action by manufacturers and

their existing and potential franchisees without the opportunity for a prompt hearing on the merits of dealer protests and without requiring any showing of good cause on the part of the protesting dealer prior to the issuance of injunctive orders deprives manufacturers and their existing and potential franchisees of property and protected constitutional rights without due process of law, in violation of the Fourteenth Amendment.

24. Dealer protests against the establishment, relocation, modification or termination of motor vehicle franchises are not required, by statute or by administrative practice, to contain any factual or evidentiary showing in support of the protest. Nor are the protests required to be made under oath or to be supported by any undertaking or bond to assure that the enjoined parties could be made whole upon a determination that the protest is without merit. See Exhibits B, C, I and J.

25. When a protest is filed, the Board is required by statute automatically and without hearing to issue an order enjoining the manufacturer and its existing or potential franchisee from proceeding with the proposed action pending a hearing on and final determination of the protest. See Exhibits D, E, H, K and L. In practice, such injunctive orders are made as a matter of course by the Executive Secretary of the Board and because of the Board's position that it has complete discretion with regard to the time within which it must set matters for hearing, either before the Board or a hearing officer designated by the

Board, the injunctive orders are of indefinite duration.

26. No procedure exists under the Automobile Franchise Act or the Board's regulations for dismissal or other summary remedy prior to a full hearing on the merits, and the Board has refused to entertain any requests for summary disposition.

27. Neither the Act as interpreted by the Board nor the Board's regulations place any limits on the time within which a hearing must be scheduled or held. In practice, many months elapse between the filing of a protest and the hearing on that protest. The protests in the Pasadena Cases were filed more than ten months ago, but no hearing has been held, and none is now scheduled. Moreover, the Board customarily refers protests for initial hearing to hearing officers designated by the Board. The hearing officer has no power to make a final decision in the matter, but merely submits a proposed decision to the Board. The Act imposes no limitation on the time within which the hearing officer must submit his proposed decision to the Board. Upon receipt of the proposed decision, the Board may adopt, reject or modify it and take further evidence. The Board's injunctive order against proposed action by a manufacturer and its existing or potential franchises remains in full force and effect unless and until the ultimate Board determination on the merits becomes final, even if the proposed decision submitted by the hearing officer is against the protesting dealer.

PREEMPTION BY FEDERAL ANTITRUST LAWS

28. The Automobile Franchise Act is invalid and unconstitutional under the Supremacy Clause of the United States Constitution (Article VI, Clause 2) because it invades a field of regulation that has been preempted by federal law and conflicts with the national economic policy expressed by the federal antitrust laws.

29. The United States has enacted a comprehensive scheme of legislation designed to promote competition in the Sherman Antitrust Act (15 U.S.C. §§ 1-7), the Clayton Antitrust Act (15 U.S.C. §§12-27), and other statutes. The policy upon which these statutes are based is one of preserving free and unfettered competition as the rule of trade.

30. The Automobile Franchise Act purports to ratify combinations or conspiracies by existing motor vehicle franchisees to prevent competition and encourages the formation of such combinations and conspiracies. The inclusion of new car dealers as members of the Board created to "adjudicate" disputes over the establishment of new motor vehicle franchises further lends to the anticompetitive effect of the statute by providing a state-approved vehicle through which existing dealers and their agents can conspire openly to restrain competition by erecting artificial barriers to new entry, creating territorial restrictions, and monopolizing various geographic markets.

31. The Automobile Franchise Act severely restrains competition in the motor vehicle business in California in the following particulars:

(a) The Act establishes substantial barriers to the entry of new competitors at the retail level of the motor vehicle business and consequently restricts competition generally in the automobile business. The protracted delay and uncertainty incident to application of the Act impose onerous burdens upon prospective new car franchised dealers which include difficulty in securing financing, suitable real estate and personnel and, as well, in preserving those arrangements during the period of months or years necessary to resolve a dealer protest. Protracted delay may result in abandonment of plans to establish a dealership. Direct costs imposed upon potential franchises by the Act include legal fees, lost profits during the period of delay, and inflationary increases in the cost of financing and constructing dealership facilities.

(b) Identical burdens are imposed by the Act on existing franchisees who wish to relocate their dealerships. In addition, such franchisees must endure the enforced continuation of operations in inadequate or uneconomic facilities, or in some cases be required to cease business completely because their existing facility is no longer available as a result of condemnation, physical destruction or other circumstance beyond their control.

(c) The burdens imposed by the Act upon new and existing franchisees at the retail level likewise restrict the ability of a manufacturer to obtain adequate representation for the sale and service of its products in various geographic areas and thereby unreasonably restrains and impairs competition among manufacturers in the motor vehicle business. In addition, the Act deprives manufacturers of sales of motor vehicles and motor vehicle parts and accessories that might otherwise have resulted from business operations enjoined by the Board.

(d) The unreasonable restraints imposed upon competition in the motor vehicle business as a result of the Act tend to reduce the availability of adequate and convenient motor vehicle sales and service facilities for the public, and tend to increase the price that the public is required to pay for motor vehicles, motor vehicle parts and accessories, and motor vehicle service.

FAILURE TO PERMIT PARTICIPATION BY POTENTIAL FRANCHISEES

32. The Automobile Franchise Act is invalid and unconstitutional under the Due Process Clause of the Fourteenth Amendment because it excludes existing and potential motor vehicle franchisees from participating in protest proceedings involving the establishment or relocation of their franchises, which said proceedings materially affect such franchisees' constitutional rights to engage in a lawful business.

33. The Automobile Franchise Act contemplates only two types of parties in protests pursuant to Vehicle Code § 3062 against the establishment or relocation of a motor vehicle franchise—protesting dealers and manufacturers. The Act does not permit a proposed new franchisee or a franchisee who wishes to relocate his dealership to present evidence or argument, or otherwise to participate as a party to the hearing on a protest against establishment or relocation. In practice, both the New Motor Vehicle Board and hearing officers designated by the Board have refused to permit proposed franchisees to intervene or participate in protest proceedings.

34. Potential franchisees and franchisees seeking to relocate their dealerships are vitally interested in the outcome of protests against such action and their property rights are affected by such action. Exclusion of such parties from protest proceedings constitutes a violation of due process of law.

ABSENCE OF COMPELLING STATE INTEREST TO JUSTIFY REGULATORY SCHEME

35. The Automobile Franchise Act denies both due process and equal protection of the law in violation of the Fourteenth Amendment since there is no compelling state interest sufficient to justify the Act's impact on constitutionally protected rights.

36. The provisions of the Automobile Franchise Act go far beyond what would be reasonably necessary

to accomplish any legitimate legislative purpose. All establishments, relocations, modifications, or terminations of motor vehicle franchises are indiscriminately swept within the Act's coverage, and consequently, the Act imposes unusual and unnecessary restrictions on the right of manufacturers and franchisees to engage in a lawful business.

IMPAIRMENT OF CONTRACTS

37. The Automobile Franchise Act purports to apply to motor vehicle franchises in existence on the date of its enactment and is therefore void as a law impairing the obligation of contracts, in violation of Article I, Section 10 of the United States Constitution.

38. Section 3069 of the Vehicle Code provides that:

> "The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises."

39. The New Motor Vehicle Board has evidenced its intent to apply the Act's provisions to pre-existing franchises in the *Service Oldsmobile-GMC, Inc.* case described in Paragraph 16 of this Complaint. In that case, Service Oldsmobile is protesting the termination of franchise agreements that were signed on August 27, 1973, before the Automobile Franchise Act was

enacted or became effective. The Board has accepted Service Oldsmobile's protest for filing and has enjoined General Motors from terminating Service Oldsmobile's franchises for Oldsmobile and GMC products pending a hearing on the merits of the protest.

UNDUE BURDEN ON INTERSTATE COMMERCE

40. The Automobile Franchise Act imposes an undue burden on interstate commerce and is therefore invalid under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

41. The Automobile Franchise Act creates substantial barriers to entry and other restraints upon competition in the motor vehicle business in California, which have been outlined in Paragraphs 30 and 31 of this Complaint. The necessary effect of those barriers and other restraints is to reduce competition for the sale of motor vehicles and motor vehicle parts and accessories, which tends to increase the price of motor vehicles and motor vehicle parts and accessories to the consuming public. To the extent competition is reduced, the quantity of motor vehicles and motor vehicle parts and accessories sold in California will consequently decline, and since a substantial proportion of such products are manufactured outside the State of California and shipped into the state in interstate commerce, the flow of interstate commerce will be impeded.

42. To the extent the Act results in a consequent reduction in the number, size and adequacy of facilities available to the public to provide repair service and parts for automobiles and trucks, competition is reduced. Since many of these automobiles and trucks are used for the shipment of goods to and from the state of California in interstate and foreign commerce, the flow of commerce will be adversely affected for this additional reason.

43. The State of California has no legitimate interest of sufficient importance to justify the burden on interstate commerce created by the Automobile Franchise Act.

DECLARATORY RELIEF

44. An actual controversy exists with respect to the constitutional validity of the Automobile Franchise Act. Plaintiffs General Motors, Fox and Muller contend that the Act is unconstitutional and invalid for all of the reasons set forth in this Complaint. Plaintiffs are informed and believe, and on that ground allege, that defendants, and each of them, contend in all respects to the contrary.

IRREPARABLE INJURY

45. Continued enforcement of the Automobile Franchise Act by defendants will cause plaintiffs and the public great and immediate irreparable injury:

(a) Under the Act, plaintiffs are automatically enjoined from establishing or relocating

motor vehicle franchises pending the hearing and determination by the Board of protests against such actions. In the Pasadena Cases, the La Canada Cases and similar situations, plaintiffs will be deprived of the full enjoyment of constitutionally protected rights of property and will lose sales of motor vehicles and motor vehicle parts and accessories that might otherwise have resulted from business operations enjoined by the Board.

(b) General Motors is now enjoined from terminating the franchises of Service Oldsmobile. General Motors' business reputation will be adversely affected by its inability to terminate promptly the franchises of a dealer who has failed to perform its obligations under the franchise agreements and which has gone out of business.

(c) Plaintiffs will suffer not only economic harm, but also that harm engendered by the imminent deprivation of constitutional rights, including the rights of due process before a fair and impartial tribunal.

(d) Plaintiffs will suffer other injuries, such as the loss of public goodwill. It would be difficult or impossible to ascertain the amount of pecuniary compensation that would afford adequate compensation for such injuries.

(e) The public will also suffer great and irreparable injury unless the Automobile Fran-

chise Act is declared unconstitutional, in that competition in the motor vehicle business will be unreasonably restrained, thereby reducing the opportunities available to the public for motor vehicle sales and service and increasing the cost of motor vehicles and motor vehicle parts and accessories.

46. Plaintiffs have no adequate remedy at law, because the harm is that engendered by the imminent deprivation of constitutional rights, and because there is no legal theory upon which they can recover damages for the injuries described above from the defendants. For the same reason, an appeal from the ultimate determination of these protests by the Board is not an adequate remedy.

Wherefore, plaintiffs pray:

1. That the Automobile Franchise Act be declared unconstitutional, void and unenforceable;

2. That defendants, their agents, and any person acting on their behalf, at their direction or under their control be permanently enjoined from taking any action to implement or enforce the provisions of the Automobile Franchise Act;

3. That upon further application by plaintiffs pending final determination of this action, defendants, their agents, and any person acting on their behalf, at their direction or under their control be preliminary enjoined from taking any action to implement or enforce the provisions of the Automobile Franchise Act; and

4. That plaintiffs recover their costs of suit herein together with such other and further relief as the Court may deem just and proper.

Dated: April 13, 1976.

Hahn & Hahn
George R. Baffa
By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
By /s/ Norin T. Grancell
Norin T. Grancell
Attorney for Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton
By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff
General Motors Corporation

Of Counsel for Plaintiff
General Motors Corporation:
Frazer F. Hilder, General Counsel
By Robert W. Culver

Exhibit A

VEHICLE CODE

§ 3057. Effective date of orders of board: final orders

Index to Notes

In general 1
Discretion 2

1. In general

Where car dealer did not file his request for a hearing until more than 30 days after order of new car dealers policy and appeals board suspending dealer's license had become final, the dealer was not entitled to further review by the board. Park Motors, Inc. v. Director, Dept. of Motor Vehicles (1973) 122 Cal.Rptr. 337, 49 C.A.3d 12.

2. Discretion

Where trial court, by writ of mandate had circumscribed the matters which the new car dealers policy and appeals board could consider in review of revocation of dealer's license and any appearance by the dealer before the board would be of no consequence, the dealer was not denied due process because it was not given notice of the board's meeting and was not present at the meeting. Park Motors, Inc. v. Director, Dept. of Motor Vehicles (1973) 122 Cal.Rptr. 337, 49 C.A.3d 12.

ARTICLE 4. HEARINGS ON FRANCHISE MODIFICATION, REPLACEMENT, TERMINATION, REFUSAL TO CONTINUE * * *, DELIVERY AND PREPARATION OBLIGATIONS, AND WARRANTY REIMBURSEMENT

Heading of Article 4, Hearings on Franchise Modification, Replacement, Termination, Refusal to Continue and Issuance, was amended by Stats.1974, c. 384, p. 953, § 3, urgency, eff. July 5, 1974, operative July 1, 1974, to read as it now appears.

Sec.
3060. Termination of franchise.
3061. Good cause.

Asterisks * * * indicate deletions by amendment.

3062. Establishing or relocating dealerships.
3063. Good cause.
3064. Delivery and preparation obligation.
3065. Warranty reimbursement.
3066. Hearings on protests.
3067. Decision.
3068. Judicial review.
3069. Application of article.

Article 4 was added by Stats.1973, c. 996, p. 1967, § 16, operative July 1, 1974.

Protests, see 13 Cal.Adm.Code 583 et seq.

Legislative finding and declaration in enactment of Stats. 1973, c. 998, see note under § 3000.

No local cost reimbursement in implementing Stats.1973, c. 996, see note under §3060.

§ 3060. Termination of franchise

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3068, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment unless the franchisor shall have first given the board and each affected * * * franchisee notice thereof at

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a * * * franchisee may file * * * a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the * * * protest by the board. In the event of multiple * * * protests, hearings shall be consolidated to expedite the disposition of the issue. (Added by Stats. 1973, c. 996, p. 1967, § 16, operative Juy 1, 1974. Amended by Stats. 1974, c. 384, p. 953, § 4, urgency, eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment. Substituted in the second paragraph of subd. (c), "franchisee" for "dealer" and "protest" for "appeal".

Library references
Contracts ⇐217.
C.J.S. Contracts §§ 397, 449.

§ 3061. Good cause

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee' failure to comply with the terms of the franchise.
(Added by Stats.1973, c. 996, p. 1963, § 16, operative July 1, 1974.)

§ 3062. Establishing or relocating dealerships

In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership * * * within or into a relevant market area where the same line-make is then represented, the

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate * * * an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee * * * may file with the board a protest to the establishing or relocating of the * * * dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such * * * dealership. In the event of multiple protests, hearings * * * may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(Added by Stats.1973, c. 996, p. 1969, § 16, operative July 1, 1974. Amended by Stats. 1974, c. 384, p. 954, § 5, urgency, eff. July 5, 1974, operative July 1, 1974; Stats.1975, c. 653, p. ....., § 1.)

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

1974 Amendment. Substituted, in the first sentence, following "franchisor" the words "shall in writing first notify the board and" for "shall notify in writing"; substituted "franchisee" for "dealer" in the second sentence; rewrote the third sentence which previously read: "if a notice of protest is filed, the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided for in Section 3066, nor thereafter if the board has determined that there is good cause for not permitting such additional dealership"; and added the last sentence relating to multiple protests.

1975 Amendment. Required board to inform franchisor that he may not establish or relocate dealership until board held specified hearing on protest, permitted rather than required board to consolidate protests in single hearing, and added second paragraph.

§ 3063. Good cause

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchises of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.
(Added by Stats.1973, c. 996, p. 1960, § 16, operative July 1, 1974.)

§ 3064. Delivery and preparation obligation

(a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of such franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on such schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, providing a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that he has fulfilled these obligations.
(Added by Stats. 1973, c. 996, p. 1960, § 16, operative July 1, 1974.)

Library references
Automobiles ⇐16.
C.J.S. Motor Vehicles § 165 et seq.

§ 3065. Warranty reimbursement

(a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part,

in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

(Added by Stats.1973, c. 996, p. 1970, § 16, operative July 1, 1974.)

Library references
Contracts ⇐205.
C.J.S. Contracts §§ 327, 342

§ 3066. Hearings on protest

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups

which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, * * * 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor * * * vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(Added by Stats.1973, c. 996, p. 1970, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p.955, § 6, urgency, eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment. Authorized "hearing officer designated by the board" to hear and consider evidence and included sections "11510" and "11517" in the enumeration in subd. (a).

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

§ 3067. Decision

The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or * * * within such * * * period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

(Added by Stats.1973, c. 966, p. 1971, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p. 955, § 7, urgency eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment, Substituted, in the second sentence, "within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or" for "or such longer period".

§ 3068. Judicial review

Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail * * *.

(Added by Stats. 1973, c. 966, p. 1971, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p. 955, § 8, urgency, eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment. Deleted following "registered mail" provision relating to individuals and groups having requested notification by the board of protests and decisions of the board.

§ 3069. Application of article

The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

(Added by Stats.1973, c. 996, p. 1971, § 16, operative July 1, 1974.)

*Asterisks * * * indicate deletions by amendment.

Exhibit B

Boller, Suttner & Gekas
Thomas R. Suttner
Fifty North First Avenue
Arcadia, California 91006
(213) 447-8107
Attorneys for
Becherer Buick, Inc.

New Motor Vehicle Board

State of California—Transportation Agency

PR-35-75

Becherer Buick, Inc.

vs.

Buick Motor Division,
General Motors Corporation

NOTICE OF PROTEST AND REQUEST FOR HEARING

To: Buick Motor Division, General Motors Corporation:

1. Protestant Becherer Buick, Inc. is the holder of a new car dealer's license and is a franchisee of Buick Motor Division.

2. Heretofore protestant has filed with the above named Board its protests of May 12, 1975 and March

26, 1975 respecting the establishment of a new franchise or additional dealership in the relevant market area as defined by statute.

3. Copies of said protests are annexed hereto and served herewith.

4. Protestant formally requests a hearing before the Board, as required by Vehicle Code Sections 3062 to 3069, inclusive.

Dated: May 22, 1975.

Boller, Suttner & Gekas
By /s/ Thomas R. Suttner
Thomas R. Suttner
Attorneys for Becherer Buick, Inc.

May 12, 1975

New Motor Vehicle Board
2415 First Avenue
Post Office Box 31
Sacramento, Calif. 95801

Attention: Sam Jennings
Executive Secretary

Dear Sirs:

We are attorneys for Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California and O'Donnell Buick-Opel, Inc., 220 South San Gabriel, San Gabriel, California. Both are present holders of franchises to sell Buick automobiles.

On May 9, 1975, there was announced in the Pasadena Star News, a daily newspaper of general circulation published in this area, that a new dealer franchise had been established by General Motors Corporation, Buick Motor Division, at the Orrin W. Fox Co., 3456 East Colorado Blvd., Pasadena Post Office, Los Angeles County, California. There has been no notice in writing to Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc., or to either of them, of the intention of General Motors Corporation to establish an additional Buick dealership in the relevant market area where the same line-make, to wit: Buick, is represented. Our two clients are located in the relevant and applicable market area, defined by Vehicle Code Section 507. Becherer Buick, Inc. is 4.1 miles from the Orrin W. Fox Co. location and O'Donnell Buick-Opel, Inc. is 4.6 miles from the Orrin W. Fox Co. location.

The attempted establishment by General Motors of an additional Buick dealer Franchise with the Orrin W. Fox Co. at said location without prior notice in writing to our clients violates Vehicle Code Section 3062. Pursuant to said section, we hereby protest to the establishing of the proposed additional dealership and respectfully request that the Board order the Orrin W. Fox Co. and General Motors Corporation to cease and desist from the operation and maintenance of said additional dealership at said location pending hearing and determination of this protest under Vehicle Code Sections 3066, 3067 and 3068.

This protest is filed to protect the record and is in no way an admission that General Motors Corporation properly failed to give written notice as required by the statute but we must assume from the action of General Motors Corporation, as evidenced by the newspaper advertising, and by the presence of new Buick automobiles at the establishment of the Orrin W. Fox Co., that General Motors Corporation does not intend to comply with the requirements of the statute and has wilfully and intentionally disregarded same. Therefore this is a demand on behalf of our clients for a hearing as provided by statute, and for the issuance of a cease and desist order pending same.

Yours very truly,

Boller, Suttner & Gekas

By
As attorneys for Becherer Buick Inc. and O'Donnell Buick-Opel, Inc.

TRS:ef

cc: Becherer Buick
O'Donnell Buick-Opel, Inc.

March 26, 1975

New Motor Vehicle Board,
2415 First Avenue,
P. O. Box 31,
Sacramento, California 95801.

Attention: Executive Secretary

Dear Sirs:

We write this letter of (sic) behalf of Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc.

Becherer is located at 840 W. Huntington Drive, Monrovia, California, and O'Donnell at 220 S. San Gabriel Blvd., San Gabriel, California.

These locations are 4.1 and 4.6 miles from the point in Los Angeles County, not incorporated but sometimes termed "East Pasadena", at which Buick Motor Division of General Motors is believed to be about to locate a new Buick franchise. The specific location is believed to be at or near 3456 East Colorado Blvd.

Efforts of O'Donnell and Becherer to confirm this intention by inquiry of local General Motors representatives have been without avail. They have been informed that new dealerships will not be discussed with present dealers and that this interdict emanates from the company headquarters in Flint, Michigan.

This in turn suggests that Buick Division may not intend to comply with, or may have overlooked, Vehicle Code Sections 3060 to 3063 and Section 507 relating to notice and hearing on proposed new dealerships.

As shown by the locations given above both O'Donnell and Becherer are within the "relevant market

area" or ten mile radius from the site of the potential new dealership at 3456 E. Colorado Blvd., East Pasadena, as prescribed by Vehicle Code Sec. 507, and therefore are entitled to protest any additional motor vehicle dealership at the suspected location, for the sale of Buicks.

We therefore make formal request under Vehicle Code Section 3062 for the hearing provided for in Vehicle Code Section 3066.

Under the circumstances, this request may be deemed premature and the Board may wish to await issuance by Buick of a written notice of its intention. However, the facts also are unclear and the Code unfortunately does not require Buick to give notice to the Board which requires us to make this protest now, to protect the record.

We would suggest that as an interim act you notify the Department that no new car dealer license may issue for Buick within our area until you have advised the Department that a hearing has been held, whether or not Buick gives proper notice.

Yours very truly,

Boller, Suttner & Gekas

By:

TRS:vlm

CC Mr. Robert A. Smith
466-3211
1750 N. Cahuenga Blvd.
LA CA 90028

Exhibit C

Boller, Suttner & Gekas
Thomas R. Suttner
Attorneys for
O'Donnell Buick-Opel Inc.
Fifty North First Avenue
Arcadia, California 91006
(213) 447-8107

New Motor Vehicle Board
State of California—Transportation Agency

PR-36-75

O'Donnell Buick-Opel Inc.

vs.

Buick Motor Division, General Motors Corporation

NOTICE OF PROTEST AND REQUEST FOR HEARING

To: Buick Motor Division, General Motors Corporation:

1. Protestant O'Donnell Buick-Opel Inc. is the holder of a new car dealer's license and is a franchisee of Buick Motor Division.

2. Heretofore protestant has filed with the above named Board its protests of May 12, 1975 and March

26, 1975 respecting the establishment of a new franchise or additional dealership in the relevant market area as defined by statute.

3. Copies of said protests are annexed hereto and served herewith.

4. Protestant formally requests a hearing before the Board, as required by Vehicle Code Sections 3062 to 3069, inclusive.

Dated: May 22, 1975.

Boller, Suttner & Gekas

By /s/ Thomas R. Suttner
Thomas R. Suttner
Attorneys for O'Donnell Buick-Opel Inc.

May 12, 1975

New Motor Vehicle Board
2415 First Avenue
Post Office Box 31
Sacramento, Calif. 95801

Attention: Sam Jennings
Executive Secretary

Dear Sirs:

We are attorneys for Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California and O'Donnell Buick-Opel, Inc., 220 South San Gabriel, San Gabriel, California. Both are present holders of franchises to sell Buick automobiles.

On May 9, 1975, there was announced in the Pasadena Star News, a daily newspaper of general circulation published in this area, that a new dealer franchise had been established by General Motors Corporation, Buick Motor Division, at the Orrin W. Fox Co., 3456 East Colorado Blvd., Pasadena Post Office, Los Angeles County, California. There has been no notice in writing to Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc., or to either of them, of the intention of General Motors Corporation to establish an additional Buick dealership in the relevent market area where the same line-make, to wit: Buick, is represented. Our two clients are located in the relevent and applicable market area, defined by Vehicle Code Section 507. Becherer Buick, Inc. is 4.1 miles from the Orrin W. Fox Co. location and O'Donnell Buick-Opel, Inc. is 4.6 miles from the Orrin W. Fox Co. location.

The attempted establishment by General Motors of an additional Buick dealer Franchise with the Orrin W. Fox Co. at said location without prior notice in writing to our clients violates Vehicle Code Section 3062. Pursuant to said section, we hereby protest to the establishing of the proposed additional dealership and respectfully request that the Board order the Orrin W. Fox Co. and General Motors Corporation to cease and desist from the operation and maintenance of said additional dealership at said location pending hearing and determination of this protest under Vehicle Code Sections 3066, 3067 and 3068.

This protest is filed to protect the record and is in no way an admission that General Motors Corporation properly failed to give written notice as required by the statute but we must assume from the action of General Motors Corporation, as evidenced by the newspaper advertising, and by the presence of new Buick automobiles at the establishment of the Orrin W. Fox Co., that General Motors Corporation does not intend to comply with the requirements of the statute and has wilfully and intentionally disregarded same. Therefore this is a demand on behalf of our clients for a hearing as provided by statute, and for the issuance of a cease and desist order pending same.

Yours very truly,

Boller, Suttner & Gekas

By

As attorneys for Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc.

TRS:ef

cc: Becherer Buick
O'Donnell Buick-Opel, Inc.

March 26, 1975

New Motor Vehicle Board,
2415 First Avenue,
P. O. Box 31,
Sacramento, California 95801.

Attention: Executive Secretary

Dear Sirs:

We write this letter of behalf of Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc.

Becherer is located at 840 W. Huntington Drive, Monrovia, California, and O'Donnell at 220 S. San Gabriel Blvd., San Gabriel, California.

These locations are 4.1 and 4.6 miles from the point in Los Angeles County, not incorporated but sometimes termed "East Pasadena", at which Buick Motor Division of General Motors is believed to be about to locate a new Buick franchise. The specific location is believed to be at or near 3456 East Colorado Blvd.

Efforts of O'Donnell and Becherer to confirm this intention by inquiry of local General Motors representatives have been without avail. They have been informed that new dealerships will not be discussed with present dealers and that this interdict emanates from the company headquarters in Flint, Michigan.

This in turn suggests that Buick Division may not intend to comply with, or may have overlooked, Vehicle Code Sections 3060 to 3063 and Section 507 relating to notice and hearing on proposed new dealerships.

As shown by the locations given above both O'Donnell and Becherer are within the "relevant market area" or ten mile radius from the site of the potential new dealership at 3456 E. Colorado Blvd., East Pasadena, as prescribed by Vehicle Code Sec. 507, and therefore are entitled to protest any additional motor vehicle dealership at the suspected location, for the sale of Buicks.

We therefore make formal request under Vehicle Code Section 3062 for the hearing provided for in Vehicle Code Section 3066.

Under the circumstances, this request may be deemed premature and the Board may wish to await issuance by Buick of a written notice of its intention. However, the facts also are unclear and the Code unfortunately does not require Buick to give notice to the Board which requires us to make this protest now, to protect the record.

We would suggest that as an interim act you notify the Department that no new car dealer license may issue for Buick within our area until you have advised the Department that a hearing has been held, whether or not Buick gives proper notice.

Yours very truly,

Boller, Suttner & Gekas

By:

TRS:vlm

CC Mr. Robert A. Smith
466-3211
1750 N. Cahuenga Blvd
L A CA 90028

Exhibit D

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P. O. Box 31
Sacramento, California 95801
(916) 445-1888

Certified Mail

May 29, 1975

Buick Motor Division
General Motors Corporation
748 Townsgate Road, Suite 300
One Thousand Oaks, CA 91361

Re: Becherer Buick, Inc. vs. Buick Motor Division
Protest No. PR-35-75

Gentlemen:

You are hereby notified that Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

3456 East Colorado Blvd., Pasadena, California

In accordance with Section 3066 of the code, the

Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,
New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

cc: Thomas R. Suttner, Esq.
Elwyn L. Judd

Exhibit E

State of California—Transportation Agency

New Motor Vehicle Board
2415 First Avenue, P. O. Box 31
Sacramento, California 95801
(916) 445-1888

Certified Mail

May 29, 1975

Buick Motor Division
General Motors Corporation
748 Townsgate Road, Suite 300
One Thousand Oaks, CA 91361

Re: O'Donnell Buick-Opel, Inc. vs. Buick Motor Division
Protest No. PR-36-75

Gentlemen:

You are hereby notified that O'Donnell Buick-Opel, Inc., 220 South San Gabriel, San Gabriel, California, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

3456 East Colorado Blvd., Pasadena, California

In accordance with Section 3066 of the code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,
New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

cc: Thomas R. Suttner, Esq.
Elwyn L. Judd

Exhibit F

State of California—Business and Transportation Agency
Office of the Director
Department of Motor Vehicles
P. O. Box 1828
Sacramento, CA 95809
(916) 322-6378

July 11, 1975

Hahn & Hahn
Attorneys at Law
Suite 900
301 East Colorado Boulevard
Pasadena, CA 91101

Attention: George R. Baffa

Gentlemen:

Your letter of July 3, 1975, addressed to the Pasadena office of the Department of Motor Vehicles has been referred to me for reply.

After receiving your letter I also reviewed the relevant code sections and other correspondence in both the department's file and in the file of the New Motor Vehicle Board. My opinion is that the franchise of Buick Motor Division to Orrin W. Fox Company to sell Buick and Opel automobiles at 3456 East Colorado Boulevard, Pasadena, California, constitutes the establishment of an additional motor vehicle dealership within the meaning of Vehicle Code Section 3062. Even if that opinion is questioned because Orrin Fox is a replacement dealer for Walter Klock Buick,

the franchise of Orrin Fox would be a relocation of an existing motor vehicle dealership within the meaning of Vehicle Code Section 3062. In either event the decision of Buick Motor Division to give no notice to existing dealers in connection with the franchising of Orrin W. Fox Company constitutes a violation of Vehicle Code Section 3062 and is actionable against the manufacturer's license of Buick Motor Division pursuant to the provisions of Vehicle Code Section 11713.2(1).

The result is that the franchise issued to Orrin W. Fox Company is proscribed by law and is therefore inoperable insofar as the Department of Motor Vehicles is concerned. This is especially so since two other Buick franchisees, Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc., have filed protests with the New Motor Vehicle Board pursuant to the provisions of Vehicle Code Section 3062. The Board has, in turn, notified the Buick Motor Division that the protests have been filed and that the Buick Motor Division may not establish or relocate the dealership proposed for Orrin Fox.

The immediate effect on your client is two-fold:

(1) If your client certifies on an application for registration of a new vehicle that Orrin W. Fox Company has a valid franchise on file with the department to sell new Buicks and Opels, such certification will constitute a violation of Vehicle Code Section 20 and will be a ground for suspension or revocation of Fox's dealer's license pursuant to the provision of Vehicle Code Section 11705(a) (3).

(2) If your client advertises either in the media or by word of mouth in direct communication with prospective purchasers that Orrin W. Fox Company is a Buick or Opel dealer, such advertisements will be in violation of Vehicle Code Section 11713(a) and a ground for suspension or revocation of Fox's dealer's license pursuant to the provisions of Vehicle Code Section 11705(a) (10).

Please contact me directly if I can be of further assistance to you in this matter.

Very truly yours,

/s/ Alan Mateer
Alan Mateer
Staff Counsel

cc: Mr. Sam W. Jennings
Mr. J. F. Lyman, Manager
Buick Motor Division
General Motors Corporation
Flint, Michigan 48550

Exhibit G

H. Gary Jeffries
Attorney at Law
Suite 810, First Western Bank Building
595 East Colorado
Pasadena, California 91101
Telephone 793-1539

Attorney for Petitioners

New Motor Vehicle Board

No.

Service Oldsmobile-GMC, Inc.;
George E. Fuller, George Cashman,
Petitioners,
vs.
General Motors Corporation
(Oldsmobile Division, Truck and
Coach Division),
Respondents.

PROTEST UNDER §3060 and §3062,
CALIFORNIA VEHICLE CODE

Petitioners, Service Oldsmobile-GMC, Inc., George E. Fuller, and George Cashman, allege as follows:

1.

Respondent, General Motors Corporation, is now, and at all times mentioned herein, is a manufacturer of motor vehicles and has within its operations, an Oldsmobile Division and a Truck and Coach Divi-

sion and is a franchisor within the meaning of §331.2 of the Vehicle Code of the State of California.

2.

Petitioner, Service Oldsmobile-GMC, Inc., is now, and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the state of California and is authorized to do and is engaged in doing business in the State of California. Said Petitioner Service Oldsmobile-GMC, Inc., is further a franchisee within the meaning of §331.1 of the Vehicle Code of the State of California.

3.

That at all times herein mentioned, petitioners George E. Fuller and George Cashman, have been officers and directors of the petitioner Service Oldsmobile-GMC, Inc. That at all times herein mentioned, said individual petitioners together with Service Oldsmobile-GMC, Inc., have conducted a new motor vehicle business as a franchisee at 3555 East South Street, Long Beach, California. That at all times herein mentioned, the petitioners have conducted the aforesaid business in accordance with, and pursuant to franchise agreements with the Oldsmobile Automobile Division and with the Truck and Coach Division of the respondent General Motors Corporation.

4.

That on or about April 18, 1975, the Oldsmobile Division of General Motors Corporation, served a

sixty day notice upon your petitioners that said respondent had elected and did thereby terminate the franchise agreement by and between the parties herein. A copy of said sixty day notice is attached hereto as Exhibit "A" and incorporated herein by reference.

5.

That on or about May 10, 1975, the Truck and Coach Division of General Motors Corporation, served a sixty day notice upon your petitioners that said respondent had elected and did thereby terminate the franchise agreement by and between the parties herein. A copy of said notice is attached hereto as Exhibit "B" and is incorporated herein by reference.

6.

That for some time prior to acquiring the aforesaid franchise agreement from respondent General Motors Corporation, your petitioners had investigated the feasibility of conducting a new motor vehicle dealership at the aforesaid South Street address. Your petitioners had determined that several prior predecessors had not been successful in operating a Oldsmobile new car dealership and that in fact three predecessors had been unsuccessful at the same address. In the course of investigating the feasibility of operating a new motor vehicle dealership at the aforesaid address, your petitioners were assured by representatives of General Motors Corporation and General Motors Acceptance Corporation, that if they would concurrently operate a General Motors Motor Home dealership with a Oldsmobile and G M C truck

franchise, then your petitioners would be successful in conducting business at the aforesaid site notwithstanding the prior business failures at said site. In reliance upon the representation by General Motors Corporation, and upon further investigation, your petitioners believed that they could successfully operate a new motor vehicle dealership at the aforesaid address provided that said dealership would include the sale and servicing of G M C trucks and G M C motor homes. Thereafter, your petitioners entered into and acquired the aforesaid franchise to conduct new car sales of Oldsmobile automobiles and new vehicle sales of G M C trucks and motor homes.

7.

As a part of the aforesaid acquisition of the General Motors franchise your petitioners agreed to develop and to construct improvements upon the aforesaid South Street address. Your petitioners were required to invest and to incur liabilities for the construction of facilities for the purpose of sales, servicing, and maintenance of G M C motor homes and G M C trucks. Said investment by your petitioners was at a sum in excess of $143,000.00. At all times herein mentioned, representatives of General Motors Corporation and General Motors Acceptance Corporation represented to your petitioners that they would not agree to grant the aforesaid franchises nor would they provide your petitioners with G M C trucks and G M C motor homes unless the aforesaid improvements, construction and developments were made on the subject site.

8.

That in order to construct and make the aforesaid improvements to the subject site, your petitioners entered into a collateral agreement with General Motors Acceptance corporation whereby said corporation loaned to your petitioners the sum of $100,000.00.

9.

That subsequent to incurring the aforesaid obligations, and causing to be constructed the improvements on the aforesaid site for purposes of conducting and operating a G M C Truck and a G M C Motor Home dealership on the aforesaid premises, the respondent General Motors Corporation refused and failed to fill your petitioner's order for G M C motor homes. That at all times herein mentioned, the respondent General Motors Corporation alleged that it could not fill orders or ship G M C motor homes to petitioner's dealership by reason of the inability of General Motors to qualify the subject motor homes for sale within the State of California. That at all times herein mentioned, said General Motors Corporation could have qualified the subject motor homes with the exercise of reasonable diligence. That at all times herein mentioned, General Motors Corporation did not obtain qualification or approval for its motor homes within the State of California notwithstanding the fact that said approval and qualification could have easily been obtained and thereby enabled your petitioners to receive shipment of said motor homes and to sell same. That the sale of General Motors motor homes was a profitable business and had re-

spondent filled orders for same, your petitioners business would have profited and been successful. That by reason of General Motors failure to provide the aforesaid motor homes, your petitioners were subject to dire and stringent financial hardship and were unable to conduct a successful dealership the aforesaid site. That it was not until about the month of April, 1975, that General Motors finally qualified its motor home for sale within the State of California. That if allowed to continue the franchise business for the sale of G M C trucks and G M C motor homes, your petitioners will be able to conduct a successful new car vehicle dealership.

10.

That in connection with, and as a part of acquiring the franchise, representatives of General Motors Corporation and General Motors Acceptance Corporation, required your petitioners to include a prior General Motors dealer as a party to the original franchise and to which prior dealer, your petitioners were required to issue approximately $100,000.00 shares of stock for the sum of $50,000.00. That said requirement of the aforesaid representatives of General Motors Corporation and General Motors Acceptance Corporation represented an unjust and improper imposition of liability upon your petitioners. Further, your petitioners in the course of business dealings with General Motors Corporation and General Motors Acceptance Corporation were frequently required to surrender assets, cash, and receivables to representatives of General Motors Corporation and General Motors Acceptance Corporation without

proper authorization or legal process. Further, that in the course of conduct of business at the aforesaid site, representatives of General Motors Corporation and General Motors Acceptance Corporation physically interferred with the conduct of business at the aforesaid site so as to cause embarrassment by and between petitioners and customers all of which, dissuaded customers from doing business with your petitioner and further causing financial hardship for the conduct of business at the aforesaid site.

11.

That all of the foregoing actions by General Motors Corporation were wrongful and improper. That but for said actions, your petitioners would have been successful in conducting the aforesaid franchise business. That respondent General Motors Corporation should not be permitted to terminate the franchise relationship by and between the parties and should be ordered to cease and desist from the aforesaid wrongful activities.

SECOND CAUSE OF ACTION

12.

Petitioners incorporate by reference paragraphs 1 through 11 of the First Cause of Action and repeat and reallege same as though set forth in full.

13.

That on or about May 5, 1975, petitioners received notice from General Motors Corporation (Truck and Coach Division) of their intention to franchise a

General Motors Corporation Truck and Coach dealership on Norwalk Boulevard just North of Telegraph Road in Santa Fe Springs, California. That said proposed additional dealership is within the relevant market area of that dealership operated and conducted by your petitioners. In accordance with §3062 of the California Vehicle Code, your petitioners hereby protest the establishment of an additional dealership within the above relevant market area. Said Notice is attached hereto as Exhibit "C".

Wherefore, your petitioners respectively request this Honorable Board to set a hearing on the protest herein filed pursuant to Sections 3060 and 3062 of the California Vehicle Code. Your petitioners will appear and present evidence at the time of the hearing.

By:

Dated: May 16, 1975 /s/ George E. Fuller
George E. Fuller,
President Service Oldsmobile-GMC, Inc.

Dated: May 16, 1975 /s/ George E. Fuller
George E. Fuller

Dated: May 16, 1975 /s/ George Cashman
George Cashman

Dated: May 16, 1975 /s/ H. Gary Jeffries
H. Gary Jeffries
Attorney for Petitioners

Exhibit "A"

Certified Mail April 17, 1975
Return Receipt Requested
Service Oldsmobile-GMC, Inc.
P. O. Box 5050
Long Beach, Ca. 90805

Attention: Messrs. George E. Fuller and George F. Cashman

Gentlemen:

It has been brought to Oldsmobile Division's attention that Service Oldsmobile-GMC, Inc., has been closed to Oldsmobile Division customers since late in February 1975. Section 5C of the Oldsmobile Dealer Sales and Service Agreement governs in part the requirements for dealership operations and provides:

> "Maintaining Dealership Operations Open for Business
>
> "Since the transportation needs of customers and owners served by Dealer can be fulfilled properly only if Dealer keeps its Dealership Premises open for business, Dealer shall maintain its respective Dealership Operations open for business during all days and hours which are customary and lawful for such operations in the community or locality in which the Dealership Operations are located."

Section 11B(8) of the Oldsmobile Dealer Sales and Service Agreement provides that Oldsmobile may terminate such agreement upon the:

> "Failure of Dealer to maintain the Dealership Operations open for business, as required under

the provisions of subsection C of Section 5 of this Agreement for seven (7) consecutive business days."

Accordingly, please take notice that Oldsmobile Division, General Motors Corporation, has elected to and does hereby terminate your Oldsmobile Dealer Sales and Service Agreement in accordance with Section 11B(8). Termination of your Agreement shall become effective 60 days after your receipt of this notice, and your status as an Oldsmobile Dealer will cease on that date.

Please be assured that Oldsmobile will endeavor to fulfill as expeditiously as practicable all of its obligations as set forth in the Oldsmobile Dealer Sales and Service Agreement as may be applicable under these circumstances.

Very truly yours,

Oldsmobile Division
General Motors Corporation
J. T.

JTD:dm Assistant Zone Manager

cc: Mr. George F. Cashman
#2 Crest Road East
Rolling Hills, Ca. 90274

Mr. George E. Fuller
4434 Woodley Avenue
Encino, Ca. 91406

California New Motor Vehicle Board
2415 First Avenue
P. O. Box 31
Sacramento, Ca. 95801

Exhibit "B"

GMC Truck & Coach
Division

General Motors Corporation
8155 Van Nuys Blvd.
Suite 1030
Panorama Towers
Panorama City, Ca. 91402
Phone 213/873-7554

April 17, 1975

Service Oldsmobile-GMC, Inc.
3555 E. South Street
P. O. Box 5050
Long Beach, California 90805

Attention: Messrs. George E. Fuller and George F. Cashman

Gentlemen:

It has been brought to GMC Truck & Coach Division's attention that Service Oldsmobile-GMC, Inc. has been closed to GMC Truck & Coach Division's customers since late in February, 1975. Section 5C of your GMC Truck & Coach Division Dealer Sales and Service Agreement, governs in part the Requirements for Dealership Operations and provides:

Maintaining Dealership Operations Open for Business

"Since the transportation needs of customers and owners served by Dealer can be fulfilled properly only if Dealer keeps its Dealership Premises open for business, Dealer shall maintain its respective Dealership Operations open for business during all days and hours which are customary and lawful for such operations in the community or locality in which the Dealership Operations are located."

Section 11B(8) of the GMC Truck & Coach Division Dealer Sales and Service Agreement provides that GMC Truck & Coach Division may terminate such agreement upon the:

"Failure of Dealer to maintain the Dealership Operations open for business, as required under the provisions of subsection C of Section 5 of this Agreement, for seven (7) consecutive business days."

Accordingly, please take notice that GMC Truck & Coach Division, General Motors Corporation, has elected to and does hereby terminate your Standard Line and Motor Home GMC Truck & Coach Division Dealer Sales and Service Agreements in accordance with Section 11B(8). Termination of your Agreements shall become effective 60 days after your receipt of this notice and your status as a GMC Truck & Coach Division Dealer will cease on that date.

Please be assured that GMC Truck & Coach Division will endeavor to fulfill as expeditiously as practicable all of its obligations as set forth in the GMC Truck &

Coach Division Dealer Sales and Service Agreement as may be applicable under these circumstances.

Very truly yours,

GMC Truck & Coach Division
General Motors Corporation

/s/ F. M. Tobias
F. M. Tobias,
Zone Manager

CC: Mr. George E. Fuller
4434 Woodley Avenue
Encino, California 91406

Mr. George F. Cashman
#2 Crest Road East
Rolling Hills, California 90274

California New Motor Vehicle Board
2415 First Avenue
P.O. Box 31
Sacramento, California 95801

Exhibit "C"

GMC Truck & Coach Division
General Motors Corporation
660 South Boulevard, East
Pontiac, Michigan 48053
313/857-5000

April 24, 1975

Mr. George E. Fuller, Pres.
Service Oldsmobile-GMC, Inc.
P.O. Box 5050
Long Beach, California 90805

Gentlemen:

Pursuant to Section 3062 of the California Vehicle Code, you are hereby notified of GMC Truck & Coach Division's intention to franchise for GMC Truck products an additional heavy duty truck dealership to be established on Norwalk Boulevard just north of Telegraph Road, which location is presently serviced by the Santa Fe Springs, California Post Office.

Very truly yours,

/s/ J. E. Jacklin
J. E. Jacklin, Manager
Dealer Organization Dept.

JEJ/das

cc: Mr. Sam W. Jennings,
Executive Secretary
New Motor Vehicle Board
2415 First Avenue, P.O. Box 31
Sacramento, California 95801

Proof of Service By Mail (1013a, 2015.5 C. C. P.)

State of California, County of Los Angeles

I am a resident of the county aforesaid: I am over the age of eighteen years and not a party to the within entitled action; my business address is:
595 East Colorado Boulevard, Suite 810, Pasadena, California.

On May 16, 1975, I served the within protest under §3060 and §3062, California Vehicle Code on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California addressed as follows:

General Motors Corporation
Truck and Coach Division
8155 Van Nuys Boulevard
Suite 1030 Panorama Towers
Panorama City, California 91402

General Motors Corp.
Oldsmobile Division
6355 Tapanga Canyon Rd.
Woodland Hills, CA 91364

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 16, 1975 at Pasadena, California

/s/ Lynn Berthel
Lynn Berthel

Exhibit H

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P. O. Box 31
Sacramento, California 95801
(916) 445-1888

Certified Mail

May 23, 1975

General Motors Corporation
Truck and Coach Division
8155 Van Nuys Boulevard
Suite 1030 Panorama Towers
Panorama City, CA 91402

Re: Service Oldsmobile-GMC, Inc.: George E. Fuller, George Cashman vs. General Motors Corporation—Protest No. PR-37-75

Gentlemen:

You are hereby notified that Service Oldsmobile-GMC, Inc., 3555 East South Street, Long Beach, California, has filed a protest with the New Motor Vehicle Board under the provisions of Sections 3060 and 3062 State of California Vehicle Code. Accordingly, you are advised that you may not terminate or refuse to continue the franchise of Service Oldsmobile-GMC, Inc., to sell Oldsmobile and General Motors Corporation vehicles until the Board has held a hearing pursuant to Section 3066 of the Vehicle Code and makes its findings and renders its decision. Neither can you establish or relocate the proposed dealership on Nor-

walk Boulevard just North of Telegraph Road in Santa Fe Springs, California, until such hearing has been held pursuant to Section 3066 and the Board has rendered the above-mentioned decision.

In accordance with Section 3066 of the Vehicle Code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,

New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

cc: General Motors Corp.
Oldsmobile Division
6355 Topanga Canyon Road
Woodland Hills, CA 91364

H. Gary Jeffries, Esq.
Elwyn L. Judd

Exhibit I

January 22, 1976

New Motor Vehicle Board
2415 First Avenue
Post Office Box 31
Sacramento, California 95801

Gentlemen:

I received a letter dated January 16th from Chevrolet Motor Division notifying me that they intend to approve the relocation of Muller Chevrolet from 3701 Oceanview Boulevard, Montrose, California to 475 Foothill Boulevard, LaCanada, California.

I wish to advise you that I protest the proposed relocation of Muller Chevrolet from Montrose, California to LaCanada, California.

Yours truly,

Jack Wall Chevrolet, Inc.

/s/ Jack Wall
Jack Wall
President

JW/pjdp

cc: Mr. R. E. O'Brien
Chevrolet Motor Division
1800 Avenue of the Stars
Los Angeles, California 90067

Exhibit J

Letterhead of Fred Bell Chevrolet
6467 Foothill Boulevard
Tujunga, California 91042
Telephone (213) 352-3241

January 21, 1976

Mr. Sam W. Jennings
Executive Secretary
New Motor Vehicle Board
2415 First Avenue P.O. Box 31
Sacramento, California 95801

Gentlemen:

Pursuant to Section 3062 of The California Vehicle Code, you are hereby notified that Bell Chevrolet Inc. takes strong exception and protests of Chevrolet Motor Division's intention to the Relocation of Muller Chevrolet, Montrose, California from 3701 Oceanview Boulevard, Montrose, California to 475 Foothill Boulevard, La Canada, California.

Yours truly,

Bell Chevrolet

/s/ Fred Bell
Fred Bell President

cc: Chevrolet Motor Division
R. E. O'Brien Zone Manager
1800 Avenue of The Stars
Los Angeles, California 90067

FB/el

Exhibit K

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P.O. Box 1828
Sacramento, California 95809
(916) 445-1888

Ronald Reagan, Governor

Certified Mail

February 6, 1976

Chevrolet Motor Division
300 Gateway East, Century City
1800 Avenue of the Stars
Los Angeles, CA 90067

Re: Jack Wall Chevrolet, Inc. vs. Chevrolet Motor Division, General Motors Corporation—Protest No. PR-87-76

Gentlemen:

You are hereby notified that Jack Wall Chevrolet, Inc., 3003 East Colorado Boulevard, Pasadena, California 91107, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

475 Foothill Boulevard, La Canada, California

In accordance with Section 3066 of the code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,

New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

/jp

cc: Jack Wall
John Holmes

Exhibit L

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P.O. Box 1828
Sacramento, California 95809
(916) 445-1888

Ronald Reagan, Governor

Certified Mail

February 6, 1976

Chevrolet Motor Division
300 Gateway East, Century City
1800 Avenue of the Stars
Los Angeles, CA 90067

Re: Bell Chevrolet, Inc. vs. Chevrolet Motor Division, General Motors Corporation—Protest No. PR-88-76

Gentlemen:

You are hereby notified that Bell Chevrolet, Inc., 6467 Foothill Boulevard, Tujunga, California 91042, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership, until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

475 Foothill Boulevard, La Canada, California

In accordance with Section 3066 of the code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,

New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

/jp

cc: Fred Bell
John Holmes

United States District Court
Central District of California

Case Number 76 1200

[Title omitted in printing]

SUMMONS

To the above named defendant(s):

You are hereby summoned and required to serve upon
plaintiff's attorney, whose address is

O'Melveny & Myers
611 West Sixth Street
Los Angeles, California 90017

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Edward M. Kritzman, Clerk

By .....
Deputy Clerk

(Seal of Court)

Date: April 13, 1976

NOTE: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Pursuant to Local Rule 4(g) of this court, the original of all documents, including exhibits to documents, shall be filed with one clear, legible copy for use by the Judge.

United States District Court
Central District of California

No. 76 1200

[Title omitted in printing]

[Filed Apr. 13, 1976]

NOTICE OF REQUIREMENT
OF THREE-JUDGE COURT

Plaintiffs respectfully notify the Court that this cause should be heard before a three-judge district court as required by 28 U.S.C. § 2281 and request that the Court notify the Chief Judge of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2284 of the filing of plaintiffs' complaint in order that the necessary designation of judges for said court may be made.

Dated: April 13, 1976.

Hahn & Hahn
George R. Baffa

By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
By /s/ Norin T. Grancell
Norin T. Grancell
Attorney for Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton
By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff

Of Counsel for Plaintiff
General Motors Corporation
Frazer F. Hilder
General Counsel
By Robert W. Culver

United States District Court
Central District of California

No. 76 1200 LTL

[Title omitted in printing]

[Filed May 7, 1976]

1. NOTICE OF MOTION AND MOTION TO DISMISS ACTION

[Fed.R.Civ.P. 12 (b)]

2. MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ACTION

Notice is hereby given that on Monday, June 7, 1976 at 10:00 a.m. or as soon thereafter as counsel can be heard in the courtroom of the Honorable Lawrence T. Lydick, Judge of the above-named court, at 312 North Spring Street, Los Angeles, California, defendant New Motor Vehicle Board will move and does hereby move the said Court for an order dismissing the complaint and action herein pursuant to Rule 12(b), Federal Rules of Civil Procedure, upon the grounds:

1. That plaintiffs have failed to state a claim upon which relief can be granted, in that the doctrine of abstention compels this Court to decline to exercise jurisdiction hereon until the courts of the State of California have had an opportunity to address the questions presented; and

2. That plaintiffs have failed to join as parties to this action persons required to be joined herein under Rule 19, Federal Rules of Civil Procedure.

Dated: May 6, 1976.

Evelle J. Younger
Attorney General

/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ACTION

PRELIMINARY STATEMENT

I *Parties*

In this action for declaratory and injunctive relief, plaintiffs, two new car dealers and the manufacturer which through its several divisions is their common franchisor, seek orders restraining implementation and enforcement of the California Automobile Franchise Act[1], and a judgment declaring the Act invalid under the U.S. Constitution. Plaintiffs seek to enjoin

[1]The statutory provisions challenged by the present action are those sections of the California Vehicle Code added by California Statutes 1973, chapter 996, section 16; amended by California Statutes 1974, chapter 384, section 3 and California Statutes 1975, chapter 653, section 1. The statutory provisions have no authorized title; the term "Automobile Franchise Act," employed by plaintiffs in their complaint, is utilized here as a convenience.

seven ongoing state administrative adjudicatory proceedings now pending before the New Motor Vehicle Board, an administrative tribunal of the State of California.

Defendants herein are the New Motor Vehicle Board of the State of California and its members sued in their official capacities, and the Department of Motor Vehicles of the State of California and its director, sued in his official capacity. Defendant Board is the statewide administrative agency before which are adjudicated certain statutorily-created causes, in the form of protests initiated by new car dealers against intended actions of their franchisors. Neither defendant Department of Motor Vehicles nor its director are necessary parties in these adjudicatory proceedings.

II *The California Automobile Franchise Act*

In 1973 the State of California enacted legislation adding to existing laws the provisions of the California Vehicle Code challenged here, relating to establishment, termination, modification and relocation of automobile sales franchises and dealerships, and providing for adjudication of protests in connection therewith by the New Motor Vehicle Board.

In enacting the 1973 legislation the California Legislature declared its policy and purpose as follows:

> "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and

that in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." Stats. 1973, ch. 996, § 1, p. 1964.

In response to the circumstances identified, the California legislature added to state law new regulatory provisions requiring for the first time that vehicle manufacturers and distributors, as franchisors, provide notice to their franchised dealers prior to taking certain actions affecting the economic interests of the latter as franchisees. The enactment left fully intact all statutory provisions under which dealers, manufacturers, and transporters of motor vehicles have been licensed in California for a number of years. Cal. Veh. Code §§ 11700 et seq.

Under the 1973 enactment (Cal. Veh. Code §§ 3060 et seq.) franchisors are required to provide the affected franchisee and the New Motor Vehicle Board written notice prior to termination, refusal to continue, modification, or replacement of any existing franchise. Cal. Veh. Code § 3060. Prior written notice to the affected franchisee and the Board is also required when a franchisor seeks to establish an

additional dealership or relocated an existing dealership within or into a defined area where the same line-make of vehicle is represented by an existing franchisee. Cal. Veh. Code § 3062.

The Act permits the affected franchisee, upon receiving notice of the franchisor's intent, to protest the intended action before the New Motor Vehicle Board (Cal. Veh. Code §§ 3060, 3062). The Board is vested with authority to hear and determine the protest on the basis of specified statutory criteria (Cal. Veh. Code §§ 3061, 3063) upon a statutorily allocated burden of proof. Cal. Veh. Code § 3066(b). Proceedings before the Board are governed by certain of the provisions of the California Administrative Procedure Act pertaining to administrative adjudication (Cal. Gov. Code §§ 11500 et seq.) Cal. Veh. Code § 3066(a). All final decisions of the Board are subject to judicial review. Cal. Veh. Code § 3068.

ARGUMENT

I

THE DOCTRINE OF ABSTENTION ANNOUNCED IN *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941) REQUIRES THIS COURT TO DECLINE TO EXERCISE JURISDICTION UPON THE PRESENT ACTION

A. The federal forum should abstain from exercise of its jurisdiction when state adjudication is likely to determine dispositive questions of state law, or modify and define issues in aid of determination of federal questions.

In *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), the United States Supreme Court outlined the circumstances whereunder, in a case in which state action is challenged in the federal courts as being contrary to the federal Constitution, abstention by the federal forum is typically appropriate. In the *Pullman* case a carrier asserted that an order of the state railroad commission denied rights under the Fourteenth Amendment and was, under state law, beyond the authority of the promulgating body to make. The carrier sought a decree enjoining enforcement of the commission's order in federal court. The Supreme Court ordered the trial court to abstain from deciding the case until the parties had obtained a decision on the state issues involved, thus to refrain from deciding an issue by making a tentative answer which might be subsequently displaced by a state adjudication. In this manner, the court explained, the federal courts "will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Id.*, at 500.

Abstention under Pullman has been given application when the federal action involves a sensitive area of state policy and when the constitutional issues advanced are premature for federal resolution, as for example where constitutional infirmity in state legislation may be avoided by a narrowing construction in the state courts, or where the challenged statute may be held unconstitutional under state law. *Reetz v. Bozanich,* 397 U.S. 82, 86-87 (1970); *City of Meridian v. Southern Bel. T. & T. Co.,* 358 U.S. 639, 640-641 (1959).

Abstention under *Pullman* has additionally been given application where consideration of state issues by the state courts may not be dispositive but may be expected in the course of litigation to modify and define the federal issues, thus aiding the federal court in a subsequent decision. *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 510-512 (1972); *Harrison v. N.A.A.C.P.,* 360 U.S. 167, 176-178 (1959); *see* Bezanson, *"Abstention: The Supreme Court and the Allocation of Judicial Power,"* 27 Vanderbilt L. Rev. 1107, 1118 (1974).

Abstention under the reasoning of *Pullman* was approved by the Ninth Circuit in affirming dismissal of a suit challenging California's statute for the licensing for naturopathic physicians. In *National Assoc. of Naturopathic Physicians v. California State Board of Chiropractic Examiners,* 442 F.2d 466 (9th Cir. 1971) the Court of Appeals noted that similar contentions had been entertained and resolved in foreign state courts and in other federal courts, but concluded that abstention and dismissal was appropriate. The court stated:

> "Despite the foregoing, we have concluded that we need not now express an opinion upon the merits of the appellant's claim. During oral argument in our court, the appellant's attorney conceded that the appellant has made no effort to challenge the validity of the pertinent California statutes in the courts of the State of California. At the same time, he urged that one recent opinion of a California appellate court strengthened the position of his client. This case is *D'Amico v. Board of Medical Examiners,* 6 Cal.App.3d 716,

86 Cal.Rptr. 245 (1970). In these circumstances, we think that the filing of the appellant's suit in the District Court was premature, that it was in no position to seek the intervention of the federal court before undertaking to obtain relief in the California courts, and that the dismissal by the District Court should be affirmed for that reason. *Reetz v. Bozanich,* 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); *cf. Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

"Affirmed." *Id.* at 467. *See also Moses v. Kinnear,* 490 F.2d 21 (9th Cir. 1973).

B. Pending state litigation is likely to dispose of the questions presented by the present action, or substantially modify and refine the federal issues herein.

Defendant New Motor Vehicle Board is at present a party in four pending state actions in which challenges to the Automobile Franchise Act have been raised under both federal and state law.

In two related but unconsolidated state actions, intended decisions of the trial court indicate the intention to determine six of the eight federal constitutional challenges brought by plaintiff here, together with state constitutional claims, in favor of the validity of the Act. In *Toyota Motor Distributors Inc. v. State of California, etc., et al.,* (Sacramento Superior Court No. 255959) the intended decision, dated April 29, 1976, upholds the Act and defendant Board's procedures under Vehicle Code sections 3062 and 3066 against challenges by a franchisor under the Supremacy Clause of Article VI of the U.S. Constitution (based on alleged conflict with the Sherman Act), and the due process and equal protection clauses of the Fifth and Fourteenth Amendments respectively. The court's intended decision also rejects claims of invalidity under California Constitution Article I, section 1 (right to acquire, process and protect property) and Article I, section 7 (due process, equal protection of the laws). In *Fresno Imports v. State of California, etc., et al.,* (Sacramento Superior Court No. 255991), decided the same date, the court reached identical issues, to the same result in an action by a franchisee to whom the provisions of Vehicle Code section 3062 were applicable. In an earlier state action, brought by a franchisor to review a final decision of defendant Board arising under the provisions of Vehicle Code section 3060 and 3066, the trial court on November 10, 1975, held that the Act does not afford an impartial tribunal to franchisors as parties before defendant Board, and is violative of both Article I section 7 of the California Constitution and section 1 of the Fourteenth Amendment to the U.S. Constitution. *American Motors Sales Corp. v. New Motor Vehicle Board of the State of California* (Sacramento Superior Court No. 254420), now on appeal to the Third Appellate District (3d Civil 15971).

In *Chrysler Corporation v. New Motor Vehicle Board of the State of California* (Sacramento Superior Court No. 258933), plaintiff franchisor asserts failure to provide an impartial forum in proceedings under Vehicle Code sections 3062 and 3066, and consequent denial of due process under Article 1, section

7 of the California Constitution and section 1 of the Fourteenth Amendment to the U.S. Constitution, and broad claims of unconstitutional violations of freedom of contract, deprivation of property without due process, and conflict with federal statutes "designed to promote competition and prohibit monopolies." An order preliminarily enjoining the Board from proceeding with the pending protest under Vehicle Code sections 3062 and 3066 was issued on March 26, 1976 and has been appealed. The Board's Petition for Supersedeas was denied without prejudice to a motion for calendar advancement on April 1, 1976 (3d Civil 15893).

The four pending actions provide early opportunities for the state appellate court not only to determine issues raised by plaintiffs here, but to decide substantial issues of state law in such a manner as to either obviate exercise of this court's jurisdiction or ripen the existing federal issues for adjudication before the federal forum.

Examples of a potential result obviating federal adjudication are present in both the *Toyota* and *Fresno* cases. In both cases plaintiffs sought declaratory and injunctive relief as well as the prerogative writ of the state court. Among the numerous challenges to the constitutionality of the Act present in both cases are the assertions that the legislation is an invalid exercise of the police power of the state and that the Act constitutes an impermissible delegation of legislative authority. These issues of state law may well be dispositive on appeal in the intermediate ap-

pellate court *(see Allen v. California Board of Barber Examiners,* 25 Cal.App.3d 1014 (1972)) or on review in the California Supreme Court. *See State Board v. Thrift-D-Lux Cleaners,* 40 Cal.2d 436, 440-446 (1953).

Moreover the issue of denial of an impartial tribunal, predicated in all four pending cases upon the statutory composition of the Board, is a matter determined in the *American Motors* case and raised in the *Toyota Motor Distributors* and *Fresno Imports* cases as a question of state as well as federal law. The California appellate courts have not been reluctant to entertain and determine that issue under the California constitution, even where the question has been raised for the first time on appeal. *Bayside Timber Co. v. Board of Supervisors,* 20 Cal.App.3d 1, 14 (1971), hrg. den. 1971.

A final determination of any one of the state constitutional issues against the validity of the Act in any one of the pending state proceedings will of course obviate exercise of this forum's jurisdiction.

Even absent a decision adverse to the Act, an early state court construction of the Act responsive to critical issues of both state and federal law is a virtual certainty.[2] Thus if pending state litigation does not

[2]In *American Motors* the State as appellant, has the burden of reversal of a trial court decision affecting the continued vitality of defendant Board as a Tribunal under Vehicle Code section 3060. In the *Toyota Motor Distributors* and *Fresno Imports* cases appeals by unsuccessful plaintiffs are anticipated from the trial court's decision, holding valid the Board's operations under Vehicle Code section 3062. In the *Chrysler Corporation* case, the State as appellant seeks reversal of an order granting a preliminary injunction against protest proceedings under Vehicle Code section 3062.

obviate exercise of federal jurisdiction altogether, the federal forum will yet benefit from the construction to be provided by the state forum in consideration of both state and federal constitutional issues. Under such circumstances, in ordering abstention in *Harrison v. N.A.A.C.P., supra,* 360 U.S. 167 (1959), the Supreme Court stated the purpose to be served thereby:

> "All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court." *Id.,* at 178.

C. Multiplicity of state remedies is available for presentation of challenges to the Act as well as for judicial review of Board action.

In approving abstention in *Harrison,* the court observed:

> "The Virginia declaratory judgment procedure . . . also provides an expeditious avenue here. And of course we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements." 360 U.S. at 178.

It is appropriate, therefore, to note that the California Supreme Court has held that declaratory relief in state court is available to a party seeking review of an agency decision, for the purpose of challenging the constitutionality of a statute on its face, even where under the doctrine of exhaustion of administrative remedies issues may otherwise be foreclosed if not first raised before the agency. *State of California v. Superior Court (Veta Co.),* 12 Cal.3d 237, 250-251 (1974). Declaratory relief upon a complaint brought prior to commencement of an agency's adjudicatory proceeding has long been available as a remedy in California. *See Eye Dog Foundation v. State Board of Guide Dogs for the Blind,* 67 Cal.2d 536, 543-544 (1967).

It is also established under California law that injunctive relief is available as a remedy upon the same allegations permitting declaratory relief, predicated upon unconstitutionality of the statute. *State of California v. Superior Court (Veta Co.), supra,* 12 Cal.3d at 252. Such relief was sought in the *Toyota Motor Distributors* and *Fresno Imports* cases in conjunction with declaratory relief, in addition to review of the Board's decision by way of prerogative writ under the "administrative mandamus" statute, Cal. Code of Civil Procedure section 1094.5. Preliminary injunctive relief was sought in and obtained from the state court in the *Chrysler Corp.* case, to restrain a pending proceeding before the Board.

The availability of a state procedure adequate to afford a review of administrative action is a factor to be considered in evaluating the necessity for federal intervention. *Alabama Comm'n v. Southern R. Co.,* 341 U.S. 341, 349 (1951). Where as here state remedies permit plaintiffs to tender their state and federal constitutional challenges in declaratory relief and injunction actions, *in addition* to established procedures for review of the agency decision, enter-

tainment of the federal action becomes even less provident. *Askew v. Hargrove,* 401 U.S. 476, 478 (1971).

When, in addition, the multiplicity of available state judicial remedies is considered in conjunction with the existence of substantial issues of state law yet to be finally determined in respect of the legislation challenged here, the state policy reflected in the licensing and regulatory scheme of which that legislation is a part, and the present pendency of active state litigation in which those issues and that policy meet, the case for abstention under *Pullman* is clear. *Reetz v. Bozanich, supra,* 397 U.S. 82 (1970). The present action should be dismissed. *National Assn. of Naturopathic Physicians v. California State Board of Chiropractic Examiners, supra,* 442 F.2d 467 (9th Cir. 1971).

II

PLAINTIFFS HAVE FAILED TO JOIN AS PARTIES TO THIS ACTION PERSONS REQUIRED TO BE JOINED HEREIN UNDER RULE 19, FEDERAL RULES OF CIVIL PROCEDURE

According to the complaint, plaintiffs are each involved in at least two of seven protest proceedings now pending before defendant New Motor Vehicle Board. Plaintiff Orrin W. Fox Co., according to paragraph 13 of the complaint, occupies a position of interest in four proceedings referred to as the *Becherer Buick* and *O'Donnell Buick Opel* cases, identified in complaint paragraphs 12(a) and 12 (c), as Protest Numbers PR-35-75, PR-50-75, PR-36-75 and PR-51-75. According to paragraph 17 of the complaint, plaintiff Muller Chevrolet occupies a position of interest in the two proceedings referred to as the *Jack Wall Chevrolet Inc.* and *Fred Bell Chevrolet* cases, identified in complaint paragraphs 12(d) and 12 (e) respectively as Protest Numbers PR-87-76 and PR-88-76. Plaintiff General Motors Corporation, through its several divisions, appears as a party in all seven protest proceedings.

Though it is clear upon the face of the complaint that Becherer Buick Inc., O'Donnell Buick-Opel, Inc., Service Oldsmobile, Inc., Jack Wall Chevrolet, Inc., and Fred Bell Chevrolet, are each parties protestant in one or more of the administrative proceedings identified in the complaint, none of these entities is joined as a party in this action, seeking to enjoin the very proceedings which they have initiated.

Presumptively each of these parties protestant is possessed of some interest in the subject matter of their respective protest proceedings which is adverse to a correlative interest of plaintiff General Motors and, in at least six cases, likewise adverse to some interest of the respective dealer plaintiffs in this action.

While the exact interests of these parties protestant have not yet been presented to the Board and are thus unknown to this defendant, the substantiality of these interests to the parties is fairly to be inferred from the prayer of plaintiffs that the forum for assertion of those interests be eliminated. A single reading of the complaint thus suffices to demonstrate that any disposition of the present action favorable to plaintiffs is impossible without "as a practical matter impair-[ing] or imped[ing the protestants'] ability to protect

that interest" (Rule 19 (a)(2)(i)), inasmuch as it is the protest procedure which enables these absent parties to protect such interests as they have, and it is that procedure which the plaintiffs seek here to avoid.

It is therefore, exactly because the interests of these parties protestant in the subject matter of their respective protests has as yet received no exposition before defendant Board, that their interest in the subject matter of the present proceeding for injunction is readily identifiable as consisting in the right not to be deprived of a presumptively legal recourse before a presumptively proper administrative forum.

These absent parties, having availed of the authorized procedures available to them under state law, are indispensable parties in this action brought by their adversaries to deprive them of the means to pursue their remedy. Unless they are joined, the action should be dismissed.

CONCLUSION

For each of the foregoing reasons it is respectfully requested that the action herein be dismissed.

Dated: May 6, 1976.

Evelle J. Younger
Attorney General

/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. 76 1200 LTL

[Title omitted in printing]

[Filed May 7, 1976]

ANSWER

Comes Now defendants Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles and answer the complaint herein on file as follows:

1. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 33 and 45(b) and therefore deny all of the allegations contained therein.

2. Defendants admit the allegation contained in Paragraphs 10, 11, 19, 21 and 38.

3. Defendants deny each and every allegation contained in Paragraphs 1, 2, 3, 5, 6, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45(a), 45(c), 45(d), 45(e) and 46 of the complaint.

As a First, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

The United States District Court should abstain from deciding this case until the state courts have acted. Abstention Doctrine.

As a Second, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

Indispensable persons have not been joined pursuant to Rule 19 in that the protesting dealers are persons needed for just adjudication and plaintiffs have not joined them.

As a Third, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

Laches.

As a Fourth, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

The complaint fails to state a claim against defendants within the subject matter jurisdiction of this court.

As a Fifth, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants pray that plaintiffs take nothing by reason of their complaint, for judg-

ment for costs herein and for such other and further relief as the court may deem proper.

Dated: May 6, 1976.

Evelle J. Younger
Attorney General

/s/ Stephen J. Egan
Stephen J. Egan
Deputy Attorney General
Attorneys for Defendants
Department of Motor Vehicles
and Herman Sillas

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

(1) NOTICE OF MOTION BY ORRIN W. FOX CO., MULLER CHEVROLET AND GENERAL MOTORS CORPORATION FOR PARTIAL SUMMARY JUDGMENT

(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Three-Judge Court)

NOTICE OF MOTION

Please Take Notice that on July 26, 1976 at 10:00 A.M., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable William P. Gray, United States Courthouse, 312 North Spring Street, Los Angeles, California, plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation will move for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure specifying that the following issues are without substantial controversy:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060-69; hereinafter the "Act") violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

a. Because the Act deprives motor vehicle manufacturers and their prospective and existing franchisees of liberty and property without prior notice and the opportunity to be heard; and

b. Because following the initial peremptory deprivation of liberty and property, the Act fails to provide for a prompt hearing and decision on the merits of the taking.

2. The Act is invalid under the Supremacy Clause of the United States Constitution because it patently conflicts with the operation and underlying economic policy of the federal antitrust laws (15 U.S.C. §§ 1-7, 12-27).

Plaintiffs will also move for an order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure specifying that there is no just reason for delay and expressly directing the entry of judgment in favor of plaintiffs on the foregoing claims; and for judgment pursuant to said order declaring the Automobile Franchise Act unconstitutional and permanently enjoining defendants, their agents, and any persons acting on their behalf, at their direction or under their control from taking any action to implement or enforce the Act's provisions.

This motion will be made on the grounds that there are no genuine issues of material fact relating to the foregoing claims, and that plaintiffs are entitled to judgment as a matter of law. The motion is based

upon this Notice of Motion and the Memorandum of Points and Authorities attached hereto; upon the affidavits of Messrs. Richard L. Fox, John Muller, James G. McCullough and John G. Niles, and the exhibits to said affidavits, served and filed herewith; and upon all other papers, records, documents and pleadings on file herein.

Plaintiffs respectfully submit that this motion must be heard by a district court of three judges pursuant to 28 U.S.C. §§ 2281 and 2284, and request that such a court be convened.

Dated: June 7, 1976.

Hahn & Hahn
George R. Baffa

By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation

By /s/ Norin T. Grancell
Norin T. Grancell
Attorney for Plaintiff Muller
Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton

By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff General
Motors Corporation

Of Counsel for Plaintiff
General Motors Corporation:
Frazer F. Hilder
General Counsel
By Robert W. Culver

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Preliminary Statement

On April 13, 1976 plaintiffs Orrin W. Fox Co. ("Fox"), Muller Chevrolet ("Muller") and General Motors Corporation ("General Motors") filed a Complaint for Declaratory Relief and Injunction with this Court, seeking a declaration that California Vehicle Code §§ 3060-69 (hereafter referred to as the "Automobile Franchise Act" or the "Act") are unconstitutional, and an order enjoining further enforcement of the Act.

Although the complaint sets forth various separate claims for relief, only two of these claims are the subject of the present motion ("Failure To Provide Prompt Hearing," Complaint, paragraphs 23 through 27; and "Preemption by Federal Antitrust Laws,"

paragraphs 28 through 31). A judgment in favor of plaintiffs on either claim will, as a practical matter, render the remainder of this action moot.

The Act's constitutional deficiencies are evident from the very language of Vehicle Code §§ 3060-69, and there is no basis for any dispute about the Act's meaning or effect in the two areas described above. Under such circumstances, summary judgment for plaintiffs on these issues is not only appropriate, but represents a particularly desirable and expeditious method for preventing further interference with plaintiffs' enjoyment of rights guaranteed by the United States Constitution. *E.g., Roe v. Wade,* 410 U.S. 113 (1973) (summary judgment declaring Texas' criminal abortion statutes unconstitutional, affirmed); *Barber v. Rader,* 350 F. Supp. 183 (S.D. Fla. 1972) (summary judgment for plaintiff in action to enjoin enforcement of state statutes that permitted ejectment of tenants without prior hearings).

The Court has jurisdiction of this action under 28 U.S.C. §§ 1331(a), 1337 and 1343(3). Section 1331 (a) applies because plaintiffs are challenging the constitutionality of state statutes under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Supremacy Clause, the Contracts Clause and the Commerce Clause. The case thus arises under the Constitution and laws of the United States, and the matter in controversy exceeds $10,000. (Affidavits of James G. McCullough, Richard L. Fox and John Muller.) The case also arises under an "Act of Congress regulating commerce or protecting trade and

commerce against restraints and monopolies" (§ 1337), because plaintiffs are challenging state statutes on the ground that those statutes impose an undue burden on interstate commerce and conflict with the federal antitrust laws. *All American Airways v. Village of Cedarhurst,* 201 F.2d 273, 277 (2d Cir. 1953). Finally, plaintiffs are seeking declaratory and injunctive relief against the deprivation under color of state law of rights (due process and equal protection of the law) secured by the Constitution of the United States. Hence, the Court has jurisdiction under § 1343(3). *Lynch v. Household Finance Corp.,* 405 U.S. 538, 543-52 (1972).

This case must be heard by a district court composed of three judges, because plaintiffs seek to enjoin the enforcement of state statutes on the ground that those statutes are contrary to the United States Constitution. 28 U.S.C. §§ 2281 and 2284; *Steffel v. Thompson,* 415 U.S. 452, 457 n.7 (1974).

II. Summary of Argument

A. *Due Process*

One provision of the Automobile Franchise Act permits existing independent franchised automobile dealers to "protest" to the California New Motor Vehicle Board against the establishment or relocation of any other franchised independent dealer for the "same line-make" of cars within a ten-mile radius of the protesting dealer's location. This "protest" is made simply by sending a letter to the Board. Upon receipt of such a letter, the Board is required by the Act

immediately and *automatically* to enjoin establishment or relocation of the dealership which is the subject of the letter of protest. This is done without prior notice to the affected dealer or manufacturer, and neither the affected dealer nor the manufacturer is afforded an opportunity to be heard prior to the peremptory issuance of the injunctive order. The injunction is indefinite in duration and, because it is issued without prior notice and the opportunity to be heard, constitutes a deprivation of liberty and property in violation of the Fourteenth Amendment to the United States Constitution.*

It must be noted at the outset that the extraordinary injunctive relief afforded private parties by the Act does not occur as the result of careful review and decision by a presumably impartial government official charged with the protection of the public welfare. To the contrary, the Act provides for this extraordinary remedy whenever one or more actual or potential competitors of the affected dealer chooses unilaterally, without any showing of good cause, and absent any judicial or quasi-judicial scrutiny, to invoke it.

None of the recognized limited circumstances of threatened immediate and irreparable injury to the health and welfare of the public are present to justify the peremptory issuance of the injunction. Indeed, it

*Other provisions of the Act which deal with termination or modification of existing franchises suffer from similar constitutional deficiencies, but these provisions are not encompassed within the instant motion.

would be incredulous to suggest that the establishment of relocation of motor vehicle dealerships poses any threat of immediate and irreparable injury to the public welfare. However, even if such circumstances were found to exist, the Act would still be fatally defective under the Fourteenth Amendment because no mechanism is provided whereby the propriety of the issuance of the injunction can be challenged prior to a full hearing on the merits and because the Act fails to require a hearing on the merits promptly following the issuance of the injunction.

B. *Supremacy—Antitrust*

The power of one or more actual or potential competitors unilaterally to invoke the injunctive process of the California New Motor Vehicle Board against other existing dealers or potential dealers within a geographic market area of 314 square miles (that area encompassed within a ten-mile radius) results in a chilling if not freezing effect upon competition. Because of the indefinite duration of the automatic injunction, the practical result of the Act is to permit existing automobile dealers, through their indiscriminate use of legal process, to preclude competitive market entry and to impose unreasonable restraints upon an otherwise free and competitive marketplace including self-serving territorial restraints and market allocations. The horizontal market allocation which results from the invocation of the automatic injunction, regardless of the duration of the restraint, constitutes a *per se* violation of Section 1 of the Sherman Act.

In addition to the immediate and dramatic adverse effect upon competition which results from the automatic injunction, the Act, by failing to permit any challenge to the propriety of the injunction prior to a full hearing on the merits and by failing to require a prompt hearing and final decision following the issuance of the peremptory injunction, results in substantial artificial barriers to the entry of new competition. Absent the effect of the Act, the capital and planning requirements essential to the establishment or relocation of a modern motor vehicle dealership are enormous. Obviously these requirements must be satisfied before the manufacturer and the independent dealer can agree to go forward with the proposed establishment or relocation. Real estate must be obtained and financing arrangements must be made as well as a plethora of other arrangements necessarily incident to the establishment of the business. The ability of the existing or potential dealer to hold all of these elements together during the indefinite period of time within which the automatic injunction may be existent, superimposes upon the already difficult road of entry by a new competitor serious practical difficulties and even greater needs for capital.

As we will show, the patently invidious impact upon competition in the motor vehicle business which results from the Act cannot be insulated from the antitrust laws of the United States by invocation of the narrow state action exemption. Thus, because the Act conflicts with the operation and underlying economic policy of the federal antitrust laws, it must be de-

clared invalid under the Supremacy Clause of the United States Constitution.

The due process and antitrust deficiencies of the Act are discussed in detail in parts V and VI of this memorandum. Part III contains a description of the Act, and part IV describes the parties to this action.

III. The Act

The Automobile Franchise Act was enacted by the California Legislature as Stats. 1973, Ch. 996 § 16 and became effective on July 1, 1974. A copy of the Act as presently in force is attached as Exhibit A to the Complaint.*

Only the Act's franchise establishment and relocation provisions are relevant to the present motion, and they operate in the following manner: Before a new motor vehicle dealership can be established or an existing dealership can relocate, Section 3062 of the Act requires the manufacturer to give written advice of such proposed establishment or relocation to the New Motor Vehicle Board and all dealers for the

*The Act purports to regulate the termination and modification of franchises for motor vehicle dealerships (Vehicle Code §§ 3060-61), the establishment and relocation of such dealerships (Vehicle Code §§ 3062-63), delivery and preparation obligations of franchised dealers (Vehicle Code § 3064), and reimbursement of franchised dealers for warranty service (Vehicle Code § 3065). Other sections of the Act prescribe procedures generally applicable to each of the foregoing subjects. Responsibility for the hearing and determination of disputes arising under the Act is given by Vehicle Code § 3050(b) to the New Motor Vehicle Board, a nine-member administrative agency within the California Department of Motor Vehicles. By statute (Vehicle Code § 3001), the Board must include four members who are new car dealers and five public members.

"same line-make" whose dealerships are within the "relevant market area," which is defined by Vehicle Code § 507 as "any area within a radius of ten miles from the site of the potential new dealership." Any dealer for the "same line-make" within this 314 square mile area may file a "protest" against the proposed establishment or relocation with the New Motor Vehicle Board. When such a protest is filed, Vehicle Code § 3062 mandates that:

> "[T]he board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, *and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing* as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership." (Emphasis added.)

The Act contains no provision for notice or an opportunity to be heard prior to the issuance of this automatic injunction, and no requirement for a prompt hearing following the issuance of such injunction.

Both civil and criminal penalties may be imposed for violations of the Board's peremptory injunctive orders as well as for violations of the Act's establishment and relocation provisions generally. Violations by dealers and manufacturers are punishable as misdemeanors under Vehicle Code §§ 11713.2(1) and 40000.11, and may be grounds for suspension or revocation of a manufacturer or dealer's license

to do business in California under Vehicle Code § 11705(a)(10).

When a hearing finally occurs, it may be before the Board itself or a hearing officer designated by the Board (Vehicle Code § 3066(a); 13 Cal. Adm. Code § 590.)* The hearing is a quasi-judicial proceeding in which the Board or its hearing officer hears evidence presented by the parties and reaches or recommends a decision. (Vehicle Code § 3066(a); Government Code § 11517.) Although strict rules of evidence do not apply, all testimony at the hearing must be under oath, and each party may call and examine witnesses, introduce written evidence and cross-examine opposing witnesses. (Government Code § 11513.) The parties are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of documents at the hearing. (Government Code § 11510.) "Other interested individuals" (including the prospective new or relocating dealer) may present evidence at the hearing, but have none of the procedural rights (such as subpoenas, cross-examination and appeal) accorded parties. (Vehicle Code § 3066(a).)**

---

*Discovery in preparation for the hearing, conduct of the hearing itself, and subsequent proceedings are regulated by Vehicle Code §§ 3066-68, by the Board's regulations, and by certain sections of the California Administrative Procedure Act (Government Code §§ 11500 *et seq.*) which are made applicable to protest proceedings by Vehicle Code § 3066(a).

**Although it can be argued that the interests of the enjoined franchisee can be adequately protected by the manufacturer, it should be noted that the enjoined franchisee has under the Act no means of directly attacking the injunction which vitally affects

If the matter is heard by a hearing officer in the first instance, he must prepare and submit a proposed decision to the Board. (Government Code § 11517.) The Act sets no time period within which this proposed decision must be submitted. The Board may affirm or reverse the decision of the hearing officer, decide to take additional evidence or refer the matter to the hearing officer for further proceedings. (Government Code § 11517(c).) If the Board decides that additional proceedings are necessary, the only time limitation on rendition of a final decision by the Board is Vehicle Code § 3067's requirement that the decision be made "within such time as may be necessitated" by the additional proceedings. Any party aggrieved by the Board's decision may seek judicial review, but must do so within 45 days. (Vehicle Code § 3068.)

IV. The Parties

Plaintiff Fox is a California corporation doing business as a dealer for new and used automobiles and trucks at 3456 East Colorado Boulevard, Pasadena, California. Fox holds franchises from American Motors Sales Corporation for American Motors automobiles and from the GMC Truck & Coach Division of General Motors Corporation for GMC trucks. Fox and General Motors have entered into a franchise agreement for Buick and Opel automobiles, but

his individual pecuniary interests. Little imagination is required to formulate a number of situations in which both the immediate and long-range interests of the manufacturer and the enjoined franchisee may differ materially.

protests against this action were filed by the franchised Buick-Opel dealers in Monrovia and San Gabriel, California.* As a result of these joint protests, the Board automatically enjoined Fox and General Motors from going forward and this injunction, which was issued on May 29, 1975, remains in full force and effect today. No hearing of any kind has been held on the merits of these protests. (Affidavits of Richard L. Fox and John G. Niles.)

Plaintiff Muller is a California corporation doing business as a dealer for new and used automobiles and trucks at 3701 Oceanview Boulevard, Montrose, California. Muller holds a franchise from the Chevrolet Motor Division of General Motors for Chevrolet automobiles and trucks. Muller wishes to relocate his dealership to a site in La Canada approximately 2.2 miles from his present location. This relocation is necessary because Muller's present facilities are inadequate. General Motors concurs in Muller's planned relocation, but the Chevrolet dealers in Pasadena and Tujunga have protested the planned relocation.** As a result of these protests the Board, on February 6, 1976, automatically enjoined Muller from relocating

*_Becherer Buick, Inc. v. Buick Motor Division, General Motors Corporation_ (Protest Nos. PR-35-75 and PR-50-75), filed on or about May 22, 1975 and August 6, 1975, respectively; and _O'Donnell Buick-Opel, Inc. v. Buick Motor Division, General Motors Corporation_ (Protest Nos. PR-36-75 and PR-51-75), filed on or about May 22, 1975 and August 6, 1975, respectively.

**_Jack Wall Chevrolet, Inc. v. Chevrolet Motor Division, General Motors Corporation_ (Protest No. PR-87-76), filed on or about January 22, 1976; and _Fred Bell Chevrolet v. Chevrolet Motor Division, General Motors Corporation_ (Protest No. PR-88-76), filed on or about January 21, 1976.

its dealership. This injunction remains in full force and effect and a hearing is scheduled before a hearing officer designated by the Board for August 2-6, 1976. (Affidavits of John Muller and John G. Niles.)

Plaintiff General Motors is a Delaware corporation with its principal place of business in Michigan. General Motors manufactures and sells motor vehicles and motor vehicle parts and accessories throughout the United States, including the State of California. General Motors is the respondent in all four of the administrative proceedings described in the preceding paragraphs. (Affidavits of James G. McCullough and John G. Niles.)

Defendants New Motor Vehicle Board and Department of Motor Vehicles have already been identified. Defendants Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian and John B. Vandenberg are duly appointed members of the New Motor Vehicle Board, and defendant Sam W. Jennings is the Board's Executive Secretary. Defendant Herman Sillas is Director of the Department of Motor Vehicles. (Affidavit of John G. Niles.)

V. The Automobile Franchise Act Deprives Motor Vehicle Manufacturers and Their Existing and Prospective Franchisees of Liberty and Property Without Due Process of Law.

A. *Due Process Requires Prior Notice and the Opportunity to Be Heard.*

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive

any person of life, liberty, or property, without due process of law."

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), Mr. Justice Jackson wrote that:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that *at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing* appropriate to the nature of the case." (Id. at 313; emphasis added.)

This fundamental principle has been repeatedly reaffirmed by the Supreme Court. *E.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-40 (1969); *Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971); and *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In *Boddie v. Connecticut, supra,* the Court elaborated as follows:

> ". . . The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, 'within the limits of practicability,' [*Mullane*] at 318, a State must afford to all individuals a meaningful opportunity to be heard

if it is to fulfill the promise of the Due Process Clause." (401 U.S. at 378-79; emphasis in original.)

These constitutional considerations are equally applicable to judicial deprivations of property and to quasi-judicial deprivations imposed by other governmental agencies. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937). In the judicial arena, for example, the Fifth and Fourteenth Amendments have required the imposition of severe limitations on the grant of prohibitory orders at preliminary stages of litigation.

Under Rule 65(a) of the Federal Rules of Civil Procedure, a court may not grant a preliminary injunction without notice to the adverse party and a hearing. Moreover, any application to a court for injunctive relief must be reviewed in light of the principle that:

> "The grant of a preliminary injunction is the exercise of a very far reaching power *never to be indulged in except in a case clearly warranting it.*" *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). (Emphasis added.)

The standards set forth for the issuance of ex parte restraining orders are even more severe; Rule 65(b) of the Federal Rules of Civil Procedure permits such ex parte orders only if the applicant can clearly show that immediate and irreparable harm will befall him before notice can be given and a hearing had. *See, Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *aff'd*, 384 U.S. 890 (1966); 7 Moore's Federal Practice ¶¶ 65.05-65.06, pp. 65-75 through 65-77.

The emphasis on notice and hearing—even in situations demanding immediate action—was made clear in the Advisory Committee Note to the 1966 Amendments to Rule 65(b), a statement implicitly approved by the Supreme Court's adoption of the 1966 Amendments and by its opinion in *Carroll v. President & Commissioners of Princess Ann*, 393 U.S. 175 (1968). The Committee Note stated:

> "In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done." (39 F.R.D, at 124).

The duration of restraining orders granted *ex parte* is also subject to significant limitations. Rule 65(b) of the Federal Rules limits such orders to ten days.*

As the above discussion demonstrates, the injunctive power of the judiciary is subject to severe constitutional limitations and to extensive statutory controls designed to insure that such constitutional limitations are implemented in the court's granting of this extraordinary remedy. If the power of the fed-

*For "good cause shown" the order may be extended an additional ten days. Under Section 527 of the California Code of Civil Procedure, the permissible duration of such a state court order is fifteen days or, if good cause is shown, twenty days.

eral judiciary is so circumscribed by the United States Constitution so too must be the power of state administrative agencies.

The Automobile Franchise Act quite obviously fails to meet this constitutional standard. The Act permits any motor vehicle dealer to obtain an automatic injunction against the establishment or relocation of a competitive dealership within 10 miles, without prior notice and the opportunity to be heard and without any showing of immediate necessity. The injunction thus obtained interferes substantially with the right of manufacturers to market motor vehicles through a network of franchised dealers at locations best suited to maximize sales and service to the public, with the right of prospective dealers to enter the motor vehicle business, and with the right of existing dealers to do business at locations where profit opportunities exist and where business operations can be conducted economically.* The Act's effect is particularly invidious when an existing dealer's facilities are condemned, destroyed by natural disaster or rendered unavailable through inability to renew a lease, because that dealer's competitors can enjoin the continuation of his business if even the slightest relocation is involved.

The Act's provision for a hearing at some later date does not cure this fundamental constitutional deficiency. In the first place, it is irrelevant that the

*There can be no doubt that these rights are protected under the Fourteenth Amendment. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) and discussion in Part V B. *infra*.

deprivation of liberty and property inflicted by an automatic injunction under Vehicle Code § 3062 is not permanent. As the United States Supreme Court stated in *Fuentes v. Shevin, supra:*

> "*[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.* . . . The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. . . . While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, *it is not decisive of the basic right to a prior hearing of some kind.*" (407 U.S. at 84-86; emphasis added.)

Moreover, "temporary" may be an overgenerous characterization of the deprivation of liberty and property imposed by the Automobile Franchise Act. As noted in Part III of this Memorandum, the Act places no limitation on the time within which the Board must act to schedule a hearing, no limitation on the time within which a hearing officer's proposed decision must be submitted to the Board, and no limitation on the time within which the Board must render a final decision if it deems additional proceedings necessary.

In addition, the establishment or relocation of a motor vehicle dealership is not one of those "extraordinary" situations where some valid governmental interest justifies deprivation of liberty or property without a prior hearing. Three cases cited by the Supreme Court in *Sniadach v. Family Finance Corp.,*

supra, 395 U.S. at 339, provide examples of the very limited circumstances under which such action is appropriate. In both *Fahey v. Mallonee*, 332 U.S. 245 (1947) and *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) the Supreme Court upheld statutes permitting governmental agencies summarily to seize operational control of banking institutions in serious financial difficulty. And in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), the Court validated a procedure permitting summary seizure of misbranded drugs by the federal Food and Drug Administration.

The factors that justified summary action in *Fahey*, *Coffin Bros.* and *Ewing*, however, are totally absent in the present case.* First, summary action was taken in those cases to benefit the general public, not to serve the interests of a private individual or a single class of individuals. Both *Fahey* and *Coffin Bros.* were based on the potentially widespread and serious consequences of bank failures, and *Ewing* on the even more important interest in safeguarding public health. Here, however, an automatic injunction against franchise establishment or relocation serves only the private interests of existing dealers by inhibiting competition. Indeed, such an injunction is actually contrary to the public interest in effective competition and adequate, convenient facilities for vehicle sales and service.

*The factors discussed in this and succeeding paragraphs are similar to those identified by the California Supreme Court in *Randone v. Appellate Department*, 5 Cal. 3d 536, 554, 96 Cal. Rptr. 709 (1971).

Secondly, the summary procedures sanctioned by the Supreme Court were pursuant to narrowly drawn statutory schemes designed to permit summary deprivation only when the delay occasioned by a prior hearing could result in serious harm to the public, and only after a finding of immediate necessity by a responsible public official, who might reasonably be expected to serve the general welfare rather than private interests. In *Ewing*, for example, the federal Food and Drug Administrator was authorized to act only after finding probable cause that misbranded drugs would endanger health or mislead customers. No similar need for immediate action exists in Automobile Franchise Act cases. The establishment or relocation of a motor vehicle franchise cannot possibly be construed as posing a grave and immediate threat of injury to the public welfare. Moreover, the Act is devoid of even the most fundamental safeguards against abuse of its summary remedy. A Vehicle Code § 3062 injunction against franchise establishment or relocation issues automatically upon application by an existing dealer. No allegation or showing of need for immediate action is required and no judgment about the necessity for such action or the merits of the protest is made by any state official.

Finally, *Fahey, Coffin Bros.* and *Ewing* were all cases in which the property appropriated did not vitally affect an individual's life or livelihood. Quite the opposite is true of an injunction against franchise establishment or relocation, especially when a relocation results from circumstances beyond the dealer or

manufacturer's control. Under the Act, a dealer who is forced to relocate by an Act of God or by losing his lease is subjected to the risk that one of his competitors will enjoin his relocation and thus put him entirely out of business. A statutory scheme that permits such a result clearly violates the fundamental requirements of due process under the Fourteenth Amendment.

B. *The Rights of "Liberty" and "Property" Guaranteed by the Fourteenth Amendment Include the Right to Engage in a Lawful Business.*

One element of the "liberty" guaranteed by the Fourteenth Amendment is the right to engage in a lawful business or occupation. As the United States Supreme Court held in *Meyer v. Nebraska*, 262 U.S. 390 (1923):

> "Without doubt, [the term liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (*Id.* at 399; emphasis added.)

The foregoing language has been repeatedly quoted by federal courts in decisions recognizing the existence of due process protection against governmental interference with the right to engage in a variety of

professions. *E.g., Feinberg v. Federal Deposit Ins. Corp.*, 522 F.2d 1335, 1340 n.8 (D.C. Cir. 1975) (bank president); *Keker v. Procunier*, 398 F. Supp. 756, 760 (E.D. Cal. 1975) (attorney); *Simmonds v. Government Employees' Service Comm'n*, 375 F. Supp. 934, 938 (D. V. I. 1975) (government employee); *Ortwein v. Mackey*, 358 F. Supp. 705, 712 (M.D. Fla. 1973) (teacher); and *Larkin v. Bruce*, 352 F. Supp. 1076, 1077 (E.D. Wis. 1972) (doctor).

The right to engage in a profession of one's choice is equally a part of the right of property guaranteed by the Fourteenth Amendment. In *Goldberg v. Kelly*, 397 U. S. 254 (1970), Mr. Justice Brennan observed for the Court that:

> "Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement. *The automobile dealer has his franchise*, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. . . .' Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965)." (*Id.* at 262 n.8; emphasis added.)

And, to the extent that Fourteenth Amendment property rights are created and defined by reference to state law—see *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)—it is abundantly clear in California that "every individual possesses as a form of prop-

erty the right to pursue any lawful calling, business or profession he may choose." *Edwards v. Fresno Community Hosp.*, 38 Cal. App. 3d 702, 705, 113 Cal. Rptr. 579 (1974). There is also no doubt that this right is one of constitutional dimension. In *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 79 Cal. Rptr. 77 (1969), the California Supreme Court declared:

> "[T]he state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny." (71 Cal. 2d at 579.)

In *Purdy & Fitzpatrick* the court struck down a labor code section that prohibited the employment of aliens on public works projects. See also *O'Hagen v. Board of Zoning Adjustments*, 19 Cal. App. 3d 151, 159, 96 Cal. Rptr. 484 (1971) (right to operate drive-in restaurant); and *Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd.*, 30 Cal. App. 3d 494, 500-01, 106 Cal. Rptr. 340 (1973) (right to engage in business as a new car dealer).

VI. The Automobile Franchise Act Conflicts With the Federal Antitrust Laws, and Is Therefore Invalid Under the Supremacy Clause.

That portion of the Act which permits one or more actual or potential competitors unilaterally to invoke the injunctive process of the New Motor Vehicle

Board against other existing dealers or potential dealers within the 314 square mile "relevant" market area is akin to the classical horizontal territorial and market allocations which have been repeatedly described as "naked restraints of trade with no purpose except stifling of competition" and which have uniformly been held to constitute *per se* violations of Section 1 of the Sherman Act. See, *e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Because the injunction is automatic and because there is no requirement for a prompt hearing on the merits following the peremptory issuance of the injunction, existing dealers are able to protect, for an indefinite duration, the 314 square mile area within which they do business from the entry of new competition and as well from the relocation of existing dealerships with which they already compete.*

In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), the court examined a franchising policy that operated in a manner almost identical to the establishment and relocation provisions of the California Vehicle Code. Under that policy, when a prospective franchisee applied for a Holiday Inn franchise, a site inspection was per-

*Moreover, because of the increased financial burden and other procedural difficulties which are posed by the potential new competitor being required "to hold his deal together" pending a final determination on the merits, the distinct possibility exists that even if the establishment of new competition is finally approved, the potential new competitor may in the interim fall by the wayside.

formed by the company to obtain relevant market data, including information about existing inns of any type in the area. The company's franchise sales department then sent written notices of the franchise application, termed "radius letters," to at least three of the Holiday Inns nearest the proposed site. Upon receipt of such notice, the company's franchisees could, if they wished, comment upon or protest establishment of the proposed franchise.

The court found that the radius letter policy, as applied in connection with American's application for a Holiday Inn franchise at the Newark, New Jersey airport, permitted existing franchisees to exercise a "veto of sorts" which precluded "further intrabrand competition" and thereby allowed those existing franchisees to divide the market among themselves. The court held that such conduct constituted a horizontal market allocation in violation of Section 1 of the Sherman Act. (521 F.2d at 1242-43.)

The similarity between the provisions of the Act which permit automobile dealers to preclude and deter new competitive entry and the situation in *American Motor Inns, supra,* is apparent. Both schemes give existing franchisees veto power over the establishment or relocation of a competitive franchise. While the role of Holiday Inns is here played by the New Motor Vehicle Board, this distinction is immaterial because the Board is required automatically to issue an injunction against establishment or relocation whenever a protest is filed. Thus, the question of whether an injunction precluding competition shall

or shall not issue is solely within the hands of the protesting dealers, just as the power to veto new competitive entry in *American Motor Inns* was solely within the hands of the existing franchisees.

Because the Act permits and promotes conduct clearly condemned by the antitrust laws of the United States, the Act is in conflict with the operation and underlying economic policy of those federal statutes. The Act is thus invalid under the Supremacy Clause of the United States Constitution, as explained by the Supreme Court in *Perez v. Campbell*, 402 U.S. 637 (1971):

> "As early as *Gibbons v. Ogden*, 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the Constitution,' are invalid under the Supremacy Clause. *Id.* at 211. . . . '[i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (402 U.S. at 649; emphasis by the Court.)

The Automobile Franchise Act's patently invidious impact on competition in the motor vehicle business cannot be insulated from the federal antitrust laws by invocation of the narrow state action exemption set forth in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. In that case, the Supreme Court held that California statutes regulating the marketing and pricing of raisins were exempt from the Sher-

man Act, even though a similar program of price control would have violated the Act if effected by a combination of private parties.

Parker v. Brown cannot be interpreted as conferring a blanket exemption from the federal antitrust laws for all state regulations, however, because the state statute involved in that case was consistent with a clearly expressed national policy. This distinction was explained by the court in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) as follows:

> "Since the Court [in *Parker v. Brown*] found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, *i.e.*, state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the prohibitions of the antitrust laws to this type state regulatory action." (444 F.2d at 936.)

The reason for subjecting restrictive state regulation to such close and careful scrutiny is that the national policy of free competition is one of paramount importance. That policy, as reflected in the

antitrust laws, has been repeatedly characterized as a "charter of freedom," *Appalachian Coal v. United States*, 288 U.S. 344, 359 (1933), and as the "Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972), so that immunity therefrom may not lightly be assumed or implied.

The intent of Congress to preserve and enhance competition in the retail motor vehicle business was manifested in the federal Automobile Dealers' Day in Court Act (15 U.S.C. §§ 1221-25; hereafter the "Federal Dealer's Act"). That law, enacted in 1956, gives franchised automobile dealers the right to sue their franchising manufacturer for acts or threats of coercion or intimidation in connection with the performance or termination of any franchise agreement. Section 1224, however specifically provides that:

> "No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States."

The preeminent importance of antitrust policies in this area was confirmed by the House Committee on the Judiciary, in its report on the bill that became the Federal Dealer's Act. The committee stated that:

> "The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes

that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of this legislation.* Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment." (H. R. Rep. No. 2850, 84th Cong., 1st Sess. (1956); emphasis added.)

The California Automobile Franchise Act is precisely the sort of "curtailment" of normal competition that the House Judiciary Committee regarded as "inconsistent with the antitrust objective" of the Federal Dealer's Act. The Automobile Franchise Act creates substantial practical barriers to entry into the retail motor vehicle business in California. An automatic injunction against franchise establishment or relocation—while theoretically directed to the motor vehicle manufacturer—imposes a hardship primarily on the small businessman who owns, or attempts to establish, a motor vehicle dealership. It is this individual, not the manufacturer, who must obtain a dealership site and purchase, lease or construct suitable improvements. A small businessman of limited resources may well find it impossible to maintain a lease or option on real estate and necessary financing arrangements for the extended period of time before there is any hearing and determination of a protest under the present statutory scheme. Under these circumstances, delay will serve to "lock out"

new dealers just as effectively as outright prohibition.

The Automobile Franchise Act's franchise establishment and relocation provisions cannot qualify for exemption under *Parker v. Brown*, but instead must be viewed as essentially private action which ". . . stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Perez v. Campbell, supra,* quoting from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In sum, the Act is clearly repugnant to the stated objectives of Congress to preserve free and open competition, and must therefore be declared invalid under the Supremacy Clause of the United States Constitution.

VII. Conclusion

For all of the reasons set forth hereinabove, plaintiffs' motion for partial summary judgment should be granted.

Dated: June 7, 1976.

Respectfully submitted,
Hahn & Hahn
George R. Baffa
By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
By /s/ Norin T. Grancell
Norin T. Grancell
Attorneys for Plaintiff
Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton
By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff
General Motors Corporation

Of Counsel for Plaintiff
General Motors Corporation
Frazer F. Hilder
General Counsel
By Robert W. Culver

United States District Court
Central District of California

No. 76-1200-WPG

[Title omitted in printing]

AFFIDAVITS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT OF

(1) RICHARD L. FOX
(2) JOHN MULLER
(3) JOHN G. NILES

AFFIDAVIT OF RICHARD L. FOX
IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

Richard L. Fox, being duly sworn deposes and says:

1. I am the President of, and majority stockholder in, the Orrin W. Fox Co., an automobile dealership located at 3456 East Colorado Boulevard, Pasadena, California. The Orrin W. Fox Co., a California corporation, was founded by my father in 1930, and has remained primarily a family business from that time to the present. From 1958 onward, my dealership has been franchised by American Motors Sales Corporation with respect to the sale of

American Motors (AMC) automobiles, and, from 1933 onward, has also been a franchised General Motors Corporation (GMC) truck dealership. This dealership provides the primary means whereby I earn my livelihood.

2. Because I have been active in Pasadena community affairs for many years, and have served two terms as President of the Pasadena Motor Car Dealers Association, I was aware that Buick's Pasadena dealer terminated his franchise in the early part of 1974. I was further aware in August of 1974 that Buick, which had been represented in Pasadena for more than 40 years, had not established a replacement dealer. I inquired of Buick's Southern California Zone Manager as to the possibility of my dealership obtaining the Buick's Pasadena franchise.

3. On April 1, 1975, Buick formally offered my dealership the opportunity to become the franchised Buick outlet in the Pasadena area. I accepted that appointment on April 7, 1975, and the Dealership Sales and Service Agreement was executed between my company and Buick, effective May 2, 1975.

4. Thereafter, Buick delivered to my dealership 47 Buick and Opel automobiles, for which I paid Buick the sum of $231,866.32. I financed that payment by utilization of my dealership's line of credit at Security Pacific National Bank, and incurred significant interest expenses in connection with that financing. In order to fulfill the obligations I had assumed under the Dealership Sales and Service Agreement with respect to servicing Buick and Opel

automobiles, I purchased from Buick a large inventory of parts. The total cost of this inventory, which I paid to Buick, was $33,300.68. I did not finance this sum, but rather paid the full amount to Buick out of my own operating capital.

5. After my company was granted the Buick franchise in May of 1975, I placed advertising in a variety of communications media, including the Los Angeles Times and the Pasadena Star-News, announcing my dealership as the Pasadena outlet for Buick and Opel automobiles. I also engaged in a direct mail campaign. My total advertising costs in this start-up period were $6,107. At or about the same time, I began selling Buick and Opel automobiles to the public.

6. On June 12, 1975, an individual who identified himself as M. P. McDonagh, a representative of the California Department of Motor Vehicles, appeared at my dealership and advised Ralph A. Thorson, an officer and director of my company, that my sales of Buick and Opel automobiles were prohibited by the order of the California New Motor Vehicle Board and therefore constituted a violation of Vehicle Code Section 3062. Mr. McDonagh further advised that, if I did not cease such sales immediately, the Department of Motor Vehicles would take disciplinary action which could result in the loss of my dealership license. I thereupon ordered all sales discontinued and subsequently sought legal counsel.

7. On July 17, 1975, I was advised by my counsel that, after lengthy consultation with the Department

of Motor Vehicles and the New Motor Vehicle Board, he had received a letter from the Department of Motor Vehicles. This letter, dated July 11, 1975, stated, in part, that the Buick and Opel franchise issued my company was proscribed by law and was therefore inoperable, and that if my company were to certify on an application for registration of a new vehicle that it had a valid Buick franchise, or if it advertised or communicated with prospective purchasers so as to indicate that it was a Buick or Opel dealer, it would be in violation of the law.

8. Shortly after the Board's prohibition against my dealership went into effect, I was advised by my counsel and by counsel for General Motors that a hearing was scheduled in the protests by Becherer Buick and O'Donnell Buick-Opel for August 11 and 12, 1975. I had hoped the matter would be resolved at that time and that I would be allowed to begin again the business of a Buick dealership. I believed 1976 would be what events have proven it to be: a year of economic recovery with respect to automobile sales. However, there was no hearing in August and, in fact, resolution of the protests concerning my dealership has been repeatedly delayed. It has now been more than 11 months since the Board first prohibited my company from selling Buick and Opel automobiles in the Pasadena community.

9. The Board's prohibition has barred my dealership from participating in the 1976 Buick model year, thereby losing the revenues and profits I would have otherwise derived, and has also caused other

economic hardships. My dealership incurred interest and demonstrator expenses amounting to $10,281 in connection with financing the Buick and Opel automobiles which I was not allowed to sell. When it became clear there would be no August hearing, I finally ended that particular financial drain by returning to Buick all the new Buick and Opel automobiles which were still on my lot. The interest paid, some $7,865, represents a loss. I have also lost all of the sums which I spent on advertising in connection with Buick and Opel automobiles. The inventory of spare parts which I purchased represents a largely unproductive drain on my working capital since the Board's prohibition prevents me from holding myself out as a Buick dealer able to provide factory authorized service. Yet another loss resulting from the Board's prohibition is the $8,450 I spent in connection with training my personnel to sell and to service Buick automobiles, and remodeling of my Parts Department in order to add additional capacity for Buick parts. All told, the Board's prohibition on my doing business as a Buick dealer has resulted in losses to date, including lost profits, far in excess of $10,000.

10. The injury I have suffered as a result of the events described above that I cannot calculate in monetary terms is the damage to my reputation in the Pasadena community. The Orrin W. Fox Co. was founded by my father 46 years ago, and from that time until the present, the company's single most important asset has always been its outstanding reputa-

tion for honesty and integrity. That reputation has been severely damaged over the last 11 months because my company, which held itself out of the Pasadena community as a responsible Buick dealership, has been unable to sell automobiles as it promised.

11. There are franchised dealerships in Pasadena representing nearly every make of automobile, whether of domestic or foreign manufacture, except for Buick. The following list indicates the makes of automobile and the dealers selling those automobiles in the Pasadena market:

Make	Dealer and Pasadena Address
Lincoln, Mercury and Capri	Foothill Motors 1339 Green Street
Chrysler and Plymouth	Pasadena Chrysler Plymouth 2965 East Colorado Boulevard
Volkswagen and International Trucks	Transocean Motors 130 North Sierra Madre
American Motors and GMC Trucks	Orrin W. Fox Co. 2456 East Colorado
Ford	Loud Ford 1355 East Colorado
Pontiac and Peugeot	Steiner Pontiac 270 North Lake Street
Dodge	Wegge Dodge 1021 East Colorado
Chevrolet	Jack Wall Chevrolet 3003 East Colorado
Austin, Jaguar, M.G., Triumph, Land Rover, Fiat, Alfa Romeo, and Rolls Royce	Peter Satori Co. 325 West Colorado

Cadillac	Bill Symes Cadillac 3475 East Colorado
Datsun	Pasadena Datsun 101 South Arroyo Parkway
Toyota	Toyota of Pasadena 2014 East Colorado
Porsche and Audi	Rusnak Porsche-Audi 337 West Colorado
Honda	Honda of Pasadena 1965 East Foothill
Jeep	Milne Brothers 1951 East Colorado
Mercedes-Benz and Volvo	Lloyd Pearson, Inc. 2025 East Colorado
Oldsmobile, Jensen and Lotus	Crown Oldsmobile 1253 East Colorado
Mazda	Pasadena Mazda 1285 East Colorado

/s/ Richard L. Fox
Richard L. Fox

(Jurat omitted in printing)

AFFIDAVIT OF JOHN MULLER IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

John Muller, being duly sworn according to law, deposes and says:

1. I am the President and principal shareholder of Muller Chevrolet, a California corporation doing busi-

ness as a dealer for new and used automobiles and trucks at 3701 Oceanview Boulevard, Montrose, California. My dealership is franchised by the Chevrolet Division of General Motors Corporation for Chevrolet automobiles and trucks. This dealership provides the primary means whereby I earn my livelihood.

2. I acquired the dealership now known as Muller Chevrolet in October of 1973, by taking over the Chevrolet outlet which then existed at the Oceanview Boulevard address. Although I own some of the land used for parking and storage of automobiles at my dealership, I do not own the land and buildings which constitute the principal physical facility itself—that is, the showroom and service stall areas. I lease the showroom and service stall areas from Mr. Theodore Gudenger. At the time I took over the dealership, I was aware that the physical facility was too small for the volume of sales and service business that I hoped to transact, and that either extensive alterations or relocation would ultimately be necessary. In that regard, I entered into a letter agreement on October 1, 1973, modifying my Chevrolet Car and Standard Truck Sales and Service Agreement (the Dealer Agreement). In this modification, I acknowledged that the existing Oceanview Boulevard facility was inadequate and that it was to be used by my company on a temporary basis only. I further agreed to take all steps necessary to provide a much larger dealership facility.

3. By the time I had been in business for some sixty days, I realized that size was not the only de-

ficiency of the Oceanview Boulevard facility, but that, in addition, there were other deficiencies so enormous as to render the physical plant totally inadequate to house an automobile dealership. This situation has become progressively worse over the last two years. The building housing the showroom and offices is presently in a state of total disrepair. The roof leaks so badly that, during rain storms, it is necessary to place a number of buckets on the showroom floor. The facility has been inspected by officers of the Fire Prevention Bureau of the Glendale Fire Department, and I have been given written notice by these officers that portions of the facilities are in violation of fire safety standards, and that certain enumerated repairs (the cost of which I estimate to be in excess of $5,000) must be made. I am aware that failure to comply with this notice and a continuing course of violation could result in sanctions against my business. In addition to the fire safety problems, the main building is suffering from termite damage. I have inspected the foundation of the building myself, and have found extensive and visible termite damage. The building also suffered damage in the major earthquake of February, 1971, including cracks and warpage in the walls. Despite my entreaties, the lessor, Mr. Gudenger, refuses to undertake any necessary repairs with respect to the problems I have described in this paragraph.

4. In November of 1973, I began looking for new facilities in the area surrounding the Oceanview Boulevard location. It soon became apparent to me that

vacant land or existing structures capable of housing an automobile dealership were extremely scarce in the immediate area, and that locating such facilities would —and, as it turned out, did—require an enormous amount of time and effort. Over the next year, I was able to locate only two acceptable sites. One site, approximately four and one-half acres of vacant land on Verdugo Road near the Foothill Freeway in LaCanada, was available in the early part of 1974, but I was not able to consummate an agreement regarding the lease of this land. The second site came to my attention in late 1974 when I learned that the owners of the Volkswagen dealership located at 475 Foothill Boulevard, LaCanada, California, were considering moving their franchise to a different location, thereby raising the possibility that the Foothill Boulevard facility would become available.

4. The Foothill Boulevard site appeared most promising, and therefore I engaged in negotiations and discussions with the principal shareholder of the Volkswagen dealership, William A. Dewey, and with the owner of the property, Continental Financing Company, with respect to my moving to that location. Continental Financing Company was represented in these discussions by Robert Smith and Bud Lacey, who indicated they were the principal shareholders of that company. These negotiations and discussions, which spanned a one-year period from December, 1974 to December, 1975, were both complex and time-consuming, particularly because of the following: (a) My being able to take over the LaCanada facility was

contingent upon Mr. Dewey acquiring another site for his dealership; (b) It was necessary to reach an agreement with Messrs. Smith and Lacey with respect to the terms and conditions of my leasing the property; and (c) It was necessary to reach an agreement with Mr. Dewey regarding my purchase of all of the equipment and furniture of his dealership. By December of 1975, all three of these matters had been resolved, in that Mr. Dewey informed me he had located and reached a tentative agreement for another facility, I had arrived at an agreement with Continental Financing with respect to the terms of my proposed lease of the property, and I had agreed to buy all of Mr. Dewey's equipment and furniture for a purchase price of $60,000.

5. Because protests have been filed against the relocation of my dealership, and because that relocation has now been prohibited by the California New Motor Vehicle Board, I must attempt to hold together all of the various aspects of my arrangements until after the protest is resolved. I do not know at this time if those arrangements can be maintained for the many months it will take to obtain a hearing and a decision by the California New Motor Vehicle Board with respect to my dealership's relocation. I am particularly concerned about lengthy delays because both Robert Smith and Bud Lacey of Continental Financing have told me that other parties are interested in leasing the LaCanada facility and that, in the event Mr. Dewey should move his dealership before such time as I could enter into a lease, Continental Financing would not

allow the property to stand vacant waiting for my relocation, but would lease it to someone else. Such an eventuality would effectively prevent my relocating at all. I am not aware of any other facilities presently available in the immediate area that are capable of accommodating an automobile dealership such as mine. Moreover, if I am not allowed to relocate, I face the possibility that the physical deterioration of the dealership building or the actions of the Glendale Fire Department will necessitate closing or vacating that facility, which would effectively mean putting my dealership out of business.

6. In the meantime, my business is severely handicapped because the present facility simply lacks the space to accommodate the numbers of persons who need automobile service. Nearly every morning my dealership is open for business, people bringing their cars in for service are forced to line up out on the street because there is no room for them in my service facility. This situation has become steadily worse, and recently, I have begun to actually turn away service business.

7. The losses of sales and service business incurred by my dealership because of the order prohibiting its relocation have been in excess of $10,000, and said losses will continue so long as the order remains in effect.

/s/ John Muller
John Muller

(Jurat omitted in printing)

Affidavit of John G. Niles In Support of Motion For Partial Summary Judgment

State of California
County of Los Angeles—ss.

John G. Niles, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of O'Melveny & Myers, a member of the bar of this Court, and one of the attorneys of record for plaintiff General Motors Corporation in this action. I have personal knowledge of the facts stated in this affidavit, and if called as a witness I could and would testify thereto under oath.

2. I am also one of the attorneys of record for General Motors in four administrative proceedings now pending before the California New Motor Vehicle Board. Those cases are styled *Becherer Buick, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-35-75 and PR-50-75), filed on or about May 22, 1975 and August 6, 1975, respectively; *O'Donnell Buick-Opel, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-36-75 and PR-51-75), filed on or about May 22, 1975 and August 6, 1975, respectively; *Jack Wall Chevrolet, Inc. v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-87-76), filed on or about January 22, 1976; and *Fred Bell Chevrolet v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-88-76), filed on or about January 21, 1976.

3. The *Becherer Buick, Inc.* and *O'Donnell Buick-Opel, Inc.* cases are protests by franchised Buick-Opel dealers in Monrovia and San Gabriel, California, respectively, against the granting of Buick and Opel franchises to the Orrin W. Fox Co. in Pasadena, California. The New Motor Vehicle Board has enjoined the establishment of this franchise pending a hearing on these protests, and Exhibits E and F to the Complaint in this action are true copies of the Board's injunctive orders. No hearing on the merits of these protests has yet been held. Although we were advised informally on June 2, 1976 that the Board has scheduled these protests for hearing before a hearing officer on September 15, 1976 in Los Angeles, the Board has not yet issued a formal order setting the hearing.

4. The *Jack Wall Chevrolet, Inc.* and *Fred Bell Chevrolet* cases are protests against the relocation of Muller Chevrolet's franchise from Montrose, California to a site approximately 2.2 miles away in LaCanada, California. The New Motor Vehicle Board has enjoined this planned relocation pending a hearing on the protests, and Exhibits K and L to the Complaint in this action are true copies of the Board's injunctive orders. No hearing on the merits of these protests has yet been held, although a hearing is now scheduled for August 2-6, 1976 in Los Angeles.

5. I have appeared before the New Motor Vehicle Board on two occasions, and I have attended two of the Board's monthly meetings. The current members

of the Board are John Onesian (President), John D. Barnes, Melicio H. Jacaban, Audrey B. Jones, Thomas Kallay and John B. Vandenberg. Mr. Kallay was recently appointed by the California Senate Rules Committee to serve out the unexpired term of Winfield J. Tuttle, who was a member of the Board when this lawsuit was filed but resigned thereafter. Three seats on the Board are now vacant because, to the best of my knowledge, successors have not been appointed for three Board members whose terms expired in January 1975. The Board's Executive Secretary is Sam W. Jennings.

/s/ John G. Niles
John G. Niles

(Jurat omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

AFFIDIVIT OF JAMES G. MCCULLOUGH IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

State of Michigan
County of Wayne—ss.

James G. McCullough, being duly sworn, deposes and says:

1. I have been employed by General Motors Corporation since 1946, and presently am employed in the State of Michigan. My present position is MANAGER, DEALER ORGANIZATION DEPARTMENT, SALES SECTION, GENERAL MOTORS MARKETING STAFF, GENERAL MOTORS CORPORATION.

2. General Motors is a Delaware corporation, authorized to do and doing business in the State of California, with its principal place of business in Michigan. General Motors manufactures motor vehicles and motor vehicle parts and accessories. As Manager of the Dealer Organization Department, I maintain a listing of all General Motors' franchised dealerships in the United States and am familiar with General Motors' franchise agreements and overall marketing plan, under which the company sells

motor vehicles and motor vehicle parts and accessories to franchised automotive dealers in the United States, including the State of California.

3. In the calendar year 1975, General Motors sold approximately 275,000 motor vehicles to franchised dealers of General Motors located in the State of California. I am generally familiar with the California Automobile Franchise Act, Vehicle Code §§ 3060-3069, inclusive, and the manner in which it operates. Such operation has already resulted in costs to General Motors in excess of $10,000, and, in my opinion, the continuing impact of the present Act on General Motors' business operations in California will produce lost sales far in excess of $10,000.

/s/ James G. McCullough
James G. McCullough

(Jurat omitted in printing)

United States District Court
Central District of California

No. CV-76-1200-WPG

[Title omitted in printing]

AFFIDAVIT OF GORDON S. ROBINSON IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

Gordon S. Robinson, being duly sworn, deposes and says:

1. I am a resident of Los Angeles County and an independent businessman. I have a letter of intent from the GMC Truck & Coach Division of General Motors Corporation to become a GMC truck dealer in Santa Fe Springs, California, and am now in the process of constructing dealership facilities on Norwalk Boulevard just north of Telegraph Road in Santa Fe Springs. I have personal knowledge of the facts stated in this affidavit, and if called as a witness I could and would testify thereto under oath.

2. From 1964 until 1973 I was employed by the Hertz Corporation in various capacities. All of my responsibilities with Hertz had to do with the rental and leasing of trucks, and my final position was as Vice President Fleet Services of the Hertz Corporation's Truck Leasing Division.

3. My experience with Hertz was primarily in the western United States. I became convinced as a result of that experience that the Southern California truck market was an extremely good one, and that I wanted to become a GMC truck dealer in that area. After leaving Hertz in 1973 I devoted my full time to attempting to secure such a dealership.

4. After investigating other possibilities, I focused my attention on the Santa Fe Springs area. I considered the commercial nature of the area, the location of competitive truck dealerships and various other factors, and decided that this would be a particularly desirable area for a GMC truck dealership.

5. In April 1975 I reached a tentative agreement with General Motors for a GMC truck franchise at the Norwalk Boulevard location described above. On April 24, 1975 General Motors sent notice of its intention to enter into a franchise with me to all other GMC truck dealers within ten miles of that location, and three dealers—Service Oldsmobile-GMC, Inc. in Long Beach, Ron Goodwin Pontiac-GMC, Inc. in Fullerton, and Nelson Pontiac in El Monte—filed protests with the New Motor Vehicle Board.

6. On May 8, 1975, immediately after the first of those protests was filed, the New Motor Vehicle Board issued an injunction against going forward with my planned dealership. Separate injunctions were issued by the Board with respect to each of the three protests. I was at that time engaged in discussions with architects and contractors with respect

to construction of dealership facilities, discussions with potential employees for the dealership, and negotiations with various sources of financing for construction of the dealership and inventory maintenance. The Board's injunction made it virtually impossible to continue any of these discussions since I could offer nc assurances about when the protests would be resolved. Contractors were reluctant to bid in the face of inflationary increases in the cost of materials and labor; potential employees were reluctant to commit themselves to a job at some uncertain time in the future; and changing interest rates affected all discussions about financing. The total capital required for a dealership like mine is approximately $1 million, and even without the uncertainty and delay created by an injunction against establishment of the franchise, it is a major undertaking to get that much capital together.

7. One of the protesting dealers, Service Oldsmobile GMC, Inc., was no longer in business at the time it filed a protest, having closed its doors in February 1975. Service Oldsmobile ultimately agreed to withdraw its protest, but not until November 18, 1975.

8. Another of the protesting dealers, Ron Goodwin Pontiac-GMC, Inc., was and is located more than ten miles from my dealership site, and was not therefore entitled to protest under the California Vehicle Code. I am advised that General Motors filed a motion to dismiss Goodwin's protest on this ground, but was told by the Board's Executive Secretary that

such a motion could not be granted in advance of a full hearing on the merits.

9. No hearing was held on the protests against my planned dealership until November 24, 1975, more than six months after the Board issued its injunction. I attended the hearing on November 24. At the outset, before any other proceedings were had, Ron Goodwin Pontiac-GMC, Inc. conceded that it was outside the ten-mile "relevant market area" and voluntarily withdrew its protest. Then, after one day of hearing and before finishing the presentation of its case, the remaining protestant—Nelson Pontiac—also voluntarily withdrew its protest.

10. Despite the fact that all of the protests were withdrawn, the Board's injunction remained in effect until December 23, 1975 because of delays in preparation of the hearing officer's proposed decision and in the Board's action on that decision.

11. I consider myself extremely fortunate to have been able to proceed with my dealership after this delay of more than seven months. I had no source of income during that period of time, and my financial resources were strained almost to the breaking point. My option to purchase the Norwalk Boulevard site expired in October 1975 because the sellers would not renew it (having done so once already), and I was very lucky that no one else purchased the property before I could. If the delay had been any longer I might very well have been unable to proceed with the dealership once I received permission to do so.

12. I incurred several thousand dollars in legal fees as a result of these protests, and of course I lost the profits I might have earned if I had gotten my dealership in operation seven months earlier. While I cannot state a precise amount, I am also certain that my dealership will be more expensive to construct now than it would have been seven months ago, because of rising prices.

/s/ Gordon S. Robinson
Gordon S. Robinson

(Jurat omitted in printing)

United States District Court
Central District of California

No. 76 1200 WPG

[Title omitted in printing]

Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment

I

Preliminary Statement

Plaintiffs have moved for partial summary judgment upon two of their several claims for relief asserted in the present action to enjoin enforcement of the California Automobile Franchise Act.[1] Specifically plaintiffs predicate their present motion upon the claims:

1. That the California Automobile Franchise Act does not require a hearing either prior to, or in reasonably close temporal proximity to, initial administrative action by the New Motor Vehicle Board under the Act, and therefore deprives plaintiffs of protected constitutional rights

---

[1]As was indicated in the Memorandum of Points and Authorities filed by defendant New Motor Vehicle Board in support of its motion to dismiss the within action, the provisions of the California Vehicle Code which are challenged here have no authorized title. The term "Automobile Franchise Act", having been initially employed by plaintiffs in their complaint, is utilized here and in defendants' other memoranda as an appropriate convention.

without due process of law, (Complaint, paragraphs 23 through 27); and

2. That the Act conflicts with the operation and underlying economic policy of the federal antitrust laws and is therefore invalid under the Supremacy Clause of the United States Constitution (Complaint, paragrahs 28 through 31).

In their Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment (hereinafter P.S.J.), plaintiffs assert that the foregoing claims present "no basis for any dispute about the Act's meaning or effect" (P.S.J. 5:23-26) and that "[a] judgment in favor of plaintiffs on either claim will, as a practical matter, render the remainder of this action moot." P.S.J. 5:19-21.

While defendants[2] agree that a judgment in favor of plaintiffs upon either such claim will in practical effect be dispositive of this action, defendants submit that the meaning and effect of the Act in the areas of each of plaintiffs' claims present substantial questions of fact which must be litigated and accordingly render summary judgment improper.

For the reasons discussed in Part IV of this memorandum, disposition of plaintiffs' claim of denial of due process of law requires factual determinations concerning the operation of the provisions of the California Automobile Franchise Act upon plaintiffs themselves. Such determinations, in addition to ad-

[2]As employed throughout this memorandum, the term "defendants" refers to the New Motor Vehicle Board and its members and executive secretary, on whose behalf this opposition is filed.

dressing the nature of the alleged rights which the Act is purported to deny, must include consideration of the conduct of the plaintiffs in connection with the requirements of the Act as well as the practical effect of the Act upon the plaintiffs. Defendants' Statement of Genuine Issues in Issues I through VII, those matters as to which defendants contend that questions of fact must be litigated in order to resolve plaintiffs' due process claim.

As is discussed in Part III hereof, plaintiffs' claim that the California Act conflicts with the federal antitrust laws must be evaluated in light of the operation of the statutory scheme itself and in terms of the conduct of the persons of whom action thereunder is required or permitted. Defendants Statement of Genuine Issues identifies, in Issue VIII, the material questions of fact necessary to be resolved in order to dispose of plaintiffs' claim of conflict.

Defendants further submit that even if genuine issues of material fact were, as plaintiffs contend, utterly absent from the case, judgment for plaintiffs upon each of the claims presented must be denied upon the legal premises on which they are advanced.

In order to adhere to a logical framework for discussion of the matters raised herein, defendants will address the "prompt hearing" (Complaint, paragraphs 23-27) and "Antitrust-Supremacy" (Complaint, paragraphs 28-31) claims in reverse order. Defendants propose to demonstrate first that the regulatory provisions embodied in the California Automobile Franchise Act constitute a prima facie valid

exercise of the police power of the state, which exercise is not rendered invalid under the Supremacy Clause by reason of any asserted conflict with federal antitrust law. Defendants will then address the operation of the regulatory provisions and will establish that such operation cannot be said, as a matter of law, to deprive plaintiffs of protected constitutional rights without due process. In the course of discussion of each of these components of plaintiffs' motion for partial summary judgment, defendants will identify, by reference to the state of the present record, the necessities for resolution by trial of the genuine factual issues material to each of the claims discussed.

II

The California Automobile Franchise Act

A. *Perspective*

Persons engaged in the businesses of manufacture and marketing of motor vehicles have long been the subject of regulatory legislation in California. Ever since enactment of California's Vehicle Act of 1923, for example, dealers and manufacturers have been authorized through a special exemption from the vehicle registration requirements of the State, to operate motor vehicles on the public highways in connection with their respective businesses. Cal.Stats. 1923, ch.266 § 46(a). In order to secure this exemption from the generally-applicable registration requirements, dealers and manufacturers were initially required only to apply for certification and special identifying license plates. Cal.Stats. 1923, ch.266 § 46(b).

In 1957, what had previously been a certification procedure became for the first time a licensing provision. Under Cal.Stats. 1957, ch. 1319, § 7, all manufacturers and dealers were required to apply for licenses in order to qualify for and continue to hold the registration exemption. Cal.Veh.Code (1957) § 201. In addition, it became unlawful on and after October 1, 1957, to act as a dealer (though not as a manufacturer) without first having procured such a license from the Department of Motor Vehicles. Cal.Veh.Code (1957) § 200.

Ten years later, the prohibition on unlicensed activity was extended to manufacturers and motor vehicle transporters by Cal.Stats. 1967, ch.557, § 2. Henceforward, it would be unlawful for any person to act as a dealer[3], manufacturer,[4] or transporter[5] without

---

[3]A dealer is defined by California Vehicle Code section 285 (subject to exclusions specified elsewhere in the Code and not relevant here) as a person who:

> "(a) For commission, money, or other thing of value, sells, exchanges, buys, or offers for sale, negotiates or attempts to negotiate, a sale or exchange of an interest in, a vehicle subject to registration under this code, or induces or attempts to induce any person to buy or exchange an interest in a vehicle and, who receives or expects to receive a commission, money, brokerage fees, profit, or any other thing of value, from either the seller or purchaser of said vehicle, or
>
> "(b) Is engaged wholly or in part in the business of selling vehicles or buying or taking in trade, vehicles for the purpose of resale, selling, or offering for sale, or consigned to be sold, or otherwise dealing in vehicles, whether or not such vehicles are owned by such person."

[4]California Vehicle Code section 388 defines "Manufacturer" as follows:

> "A 'manufacturer' is any person who manufactures or assembles new motor vehicles subject to registration under this code and who maintains representatives for the purpose

a valid license and certificate issued by the Department of Motor Vehicles. Cal.Veh.Code § 11700.

While California over the years had thus gradually expanded the scope of its regulation of motor vehicle manufacture, distribution and marketing through the licensing function, prior to 1973 the legislature of this State—unlike those of numerous other jurisdictions[6] and the Congress of the United States[7] had not interjected its regulatory authority into relations between franchisor and the retail sales level of the motor vehicle business.

By the end of 1973, however, the growth of the components of the motor vehicle industry subject to state licensure had increased markedly. Since as recently as 1964, the number of licensed motor vehicle dealers alone (not including dealers of motorcycles, trailers and snowmobiles) increased by more

---

of contacting dealers or distributors in the state or grants franchises to dealers or distributors in this state. The scope and application of this section shall be limited to Division 2 (commencing with Section 1500)."

[5]Under California Vehicle Code section 645, a "transporter" is, generally, a person other than a tow car operator who engages in the business of moving vehicles for delivery from one location to another.

[6]Eight jurisdictions—Colorado, Georgia, Iowa, Louisiana, Nebraska, Rhode Island, Tennessee and Texas—have created statutory commissions having jurisdiction to adjudicate good cause or justification in connection with proposed establishment of additional franchised dealerships within market areas serviced by existing dealerships.

[7]15 U.S. Code §§ 1221-1225, commonly known as the Automobile Dealer's Day in Court Act, was enacted by Congress in 1956 and creates a federal cause of action in any dealer suffering damage resulting from failure of its manufacturer-franchiser to act in good faith in complying with its franchise agreement or in terminating or refusing to renew its franchise with the dealer.

than 11%, from 6,751 to 7,568. Affidavit of Fred J. Lema, filed herewith.

In addition, in the eighteen-year period between 1955 and the end of 1973 the volume of annual registrations of new motor vehicles (automobiles and trucks only) had increased from approximately seven hundred and forty-two thousand in 1955 to over one million, three hundred seventy thousand in 1973, representing a near-doubling of annual new car sales as between those two calendar years. Affidavit of Robert W. Burgett, filed herewith.

Motor vehicle fees, based on value, which were generated by new vehicle sales (automobile and truck only) for those years likewise increased, from $18,624,490 for 1955, to $38,536,889 for 1973; and total fees for new motor vehicles (automobiles and trucks only) rose from $26,593,194 for 1955 to $73,602,836 for 1973. *Id.*

In 1973, the California legislature announced the following purpose:

> "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and that in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to

insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." Cal.Stats. 1973, ch. 996, § 1.

Accordingly, California enacted the state's first legislation interposing the police power between the new car dealer and his franchisor.

B. *The Act*

Pursuant to the declared purpose "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally" (Cal.Stats. 1973, ch. 996, § 1), the legislature added the new regulatory provisions which include those California Vehicle Code sections referred to in this action as the Automobile Franchise Act (Cal.Stats. 1973, ch. 996, § 16) effective July 1, 1974.[8]

In substance the Act created new regulatory requirements in several areas of business relations between motor vehicle franchisors and franchisees.[9]

[8]A copy of the Act as currently set forth in California Vehicle Code sections 3060 through 3069, is annexed hereto as an Appendix, and is also correctly reproduced as Exhibit A of the complaint.

[9]California Vehicle Code sections 331.1 and 331.2, respectively, define "franchisee" and "franchisor" as follows:

"§331.1. A 'franchisee' is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.

"§331.2. A 'franchisor' is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise."

The 1973 legislation also established the New Motor Vehicle Board, consisting of nine members (Cal.Veh. Code § 3000) and invested it with particular duties in connection with those several areas of franchisor-franchisee relations.

First, the Act creates specific statutory procedures which must be followed by a franchisor in order to effect a modification, replacement, termination, or refusal to continue a franchise (Cal.Veh.Code § 3060) and establishes criteria for determination whether good cause exists for such action by the franchisor. Cal.Veh.Code § 3061. The New Motor Vehicle Board is empowered, upon the filing of a protest by an affected franchisee, to determine, pursuant to specified procedures and in accordance with the statutory criteria, whether good cause exists for such modification, replacement, termination, or refusal to continue a franchise (Cal.Veh.Code §§ 3050(d); 3060(b), (c)).

Modification, replacement, termination or refusal to renew a franchise in violation of the Automobile Franchise Act is unlawful. Cal.Veh. Code § 11713.2(1).

The Act also requires every franchisor to specify to its franchisees the delivery and preparation obligations of such dealers prior to delivery of new vehicles to retail buyers, limits to such specified obligations the franchisee's responsibility for product liability between it and the franchisor, and requires a reasonable schedule of compensation for work performed in connection with such obligations to be filed with

the Board. Cal.Veh.Code § 3064(a). The reasonableness of the compensation provided for is subject to approval by the Board pursuant to specified protest procedures. *Id.* Further, the Act provides for adequate and fair compensation to the franchisee for parts and labor used to fulfill warranty obligations, requires the franchisor to file a warranty reimbursement schedule with the Board, and, under specified protest procedures, authorizes the Board to determine the reasonableness of the schedule. Cal.Veh. Code § 3065(a).

Finally, and most importantly for purposes of this action, the Act imposes specific procedural requirements upon a franchisor which seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area, as defined,[10] where the same line-make is then represented. Under such circumstances the franchisor is required to notify in writing both the New Motor Vehicle Board and each franchisee in such line-make in the relevant market area, of the franchisor's intention. Within fifteen days of receipt of the notification any such franchisee may file with the Board a protest against the franchisor's intended action. Upon the filing of such protest, the Board must inform the franchisor:

[10]California Vehicle Code section 507 provides:
"The 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership."

First, that the protest has been filed;

Second, that a hearing is required to be held pursuant to specific provisions of the Act; and

Third, that the franchisor shall not establish or relocate the proposed dealership until the Board has held the required hearing, nor thereafter if the Board should determine that good cause exists for not permitting such dealership. Cal.Veh.Code § 3062.

Subsequent to issuance of the foregoing notification under section 3062, the Board must—as it must in connection with protests upon any of the other matters over which it exercises its review authority—order a hearing to be held within 60 days from the date of that order and must by copy thereof, notify the franchisor, the protesting franchisee, and all individuals or groups which have requested notification of protests and of decisions of the Board. Cal. Veh.Code § 3066(a). In such hearing:

> "The board, or a hearing officer, designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups and the board shall make its decision solely on the record so made." Cal.Veh.Code § 3066(a).

The procedures under which the hearing is conducted are prescribed by reference to specific provision of the California Administrative Procedure Act (Cal. Gov.Code § 11500 et seq.). In protests against modification, replacement, termination or refusal to continue a franchise, the burden of proof is on the

franchisor to establish the existence of good cause for the proposed action. In all other protests, including protests against establishment or relocation of motor vehicle dealerships, such as are the subject of the present action, the burden of proof is upon the franchisee. In a protest filed under California Vehicle Code section 3062 against such establishment or relocation, the protesting franchisee must prove that there is good cause *not* to permit the proposed action. Ca. Veh.Code § 3066(b).

The elements of proof which the protesting franchisee must establish are identified in California Vehicle Code section 3063, which provides:

> "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> (1) Permanency of the investment.
>
> (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> (3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

> (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

The decision of the Board must be in writing and must contain findings of fact and a determination of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the hearing officer's proposed decision, as the case may be. If the Board does not act within the requisite time, the proposed action of the franchisor is deemed approved. Cal.Veh.Code § 3067.

Judicial review of a final decision of the Board may be sought within 45 days from the announcement of the decision. Cal.Veh.Code § 3068.

To enter into or relocate a franchise in violation of the Automobile Franchise Act is unlawful under California Vehicle Code section 11713.2(1).

III

The Supremacy Clause of the United States Constitution does not render the California Franchise Act invalid

A. *Synopsis of Plaintiff's Contention*

Plaintiffs have argued in support of their motion for partial summary judgment that the provisions of the California Automobile Franchise Act creating a right in a franchised new motor vehicle dealer to protest the proposed establishment or relocation of

other franchises of the same line-make within relevant market areas resembles horizontal territorial and market allocations which have been held to constitute per se violations of Section 1 of the Sherman Antitrust Act (15 U.S.C. §1).

Pointing out that in enactment of the Automobile Dealers' Day in Court Act, (15 U.S.C. 1221-1225) Congress specifically provided that "[N]o provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States" (15 U.S.C. § 1224), plaintiffs argue first that that Act manifests Congressional intent to preserve and enhance competition in the retail motor vehicle business, and ask the Court to find that the California Automobile Franchise Act conflicts with that intent.

Likening the procedure established by Vehicle Code section 3062 to the operation of a "radius letter" policy of Holiday Inns in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), plaintiffs suggest, in adverting to the facts found in that case, that the California Act "give[s] existing franchisees veto power over the establishment or relocation of a competitive franchise." P.S.J. 29:24-25. Upon this basis, and coupled with the assertion that the California enactment is "akin to" horizontal territorial and market allocations prohibited under the Sherman Act, (P.S.J. 27:29-28:9), plaintiffs argue that "[t]he Act is in conflict with the operation and underlying economic policy of [the] federal [antitrust] statutes" and "is thus invalid under the

Supremacy Clause of the United States Constitution. . ." P.S.J. 30:6-11.

B. *The Congress has not Preempted State Regulation of Retail Marketing of Motor Vehicles.*

The claim advanced by plaintiffs under the rubric Supremacy-Antitrust" (P.S.J. 9:3) is itself only superficially "akin to" an assertion of federal preemption as a basis for invalidity of state regulatory legislation. The resemblance between plaintiffs' present claim and a true preemption case is, however, unsupported by the least degree of consanguinity. The reason for this is of course that "[w]hether a federal statute preempts the otherwise lawful authority of a state or local government to regulate in a specific area is a question of Congressional intent" (*Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 671 (9th Cir. 1972, aff'd 411 U.S. 624), and the intent of Congress with respect to the right of states to regulate in the area in question here has been given unequivocal expression by the Automobile Dealers Day in Court Act itself. That Act specifically provides:

> "This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which cannot be reconciled." 15 U.S.C. § 1225.

Plaintiffs do not attempt, nor, it is submitted, can they, point to a single express provision of the federal Act with which an express provision of the California

Act directly conflicts. Indeed, the only provision of the federal Act to which plaintiffs directly advert is that section which merely affirms that the antitrust laws of the United States are utterly unaffected by the Automobile Dealers Day in Court Act. 15 U.S.C. § 1225. P.S.J. 32:21-24.

It is apparent, therefore, that plaintiffs' "antitrust-supremacy" claim derives no support from the Automobile Dealers' Day in Court Act, which in two consecutive sections forswears both any purpose to affect the federal antitrust laws (15 U.S.C. § 1225) and any intent to invalidate state law unless a direct conflict is present (15 U.S.C. § 1225). The plain language of the Automobile Dealers Day in Court Act thus leaves no room for the argument that the Congress, in creating a new federal remedy for franchisees against their franchisor, had any intention of either expanding the reach of the antitrust laws or diminishing the effectiveness of state business regulation of motor vehicle marketing.

C. *The California Automobile Franchise Act does not Conflict with the Operation or Policy of the Federal Antitrust Laws*

1. *A determination that the State's exercise of the police power is invalid under the Supremacy clause is justified only when it is demonstrated that such action clearly results in actual conflict with federal law.*

Once it is determined, as defendants submit it must be, that Congress in the Automobile Dealers' Day in

Court Act did not preempt the field of regulation of business relations among motor vehicle franchisors and franchisees, the question which remains for resolution of plaintiffs' claim that the California Automobile Franchise Act is precluded from operation under the Supremacy Clause, is whether the California enactment conflicts with the federal antitrust laws themselves.

In addressing this question the rule is fundamental that actual conflict of the State police power with federal law must be made clearly to appear before the state law will be deemed invalid under the Supremacy Clause. See *Savage v. Jones,* 225 U.S. 501, 533 (1912).

That this requirement applies to a claim of inconsistency of state law with federal antitrust law is no less clearly established. In *Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966), reh.den. 384 U.S. 967, the Supreme Court considered a claim that a New York requirement involving compilation of price information on liquor sales to wholesalers and retailers by distillers was inconsistent with various provisions of the Sherman Act (15 U.S.C. §§ 1-7) and section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13). In rejecting the claim, the Court in *Seagram & Sons* stated the rule applicable to judicial consideration of claims of inconsistency with federal antitrust laws, such as the claim at bar, observing, "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation

where none clearly exists' Huron Cement Co. v. Detroit, 362 U.S. 440, 446. We find no such clear conflict in the present case." 384 U.S. at 45 (ellipses and brackets in original).

For the reasons set forth in the following sections of this Part, defendants respectfully submit that no clear conflict, such as is required to be demonstrated before a State statute may be found invalid under the Supremacy Clause, has been established, and plaintiffs' motion for summary judgment upon this claim must accordingly be denied.

2. *The American Motor Inns decision does not support plaintiffs' contention that the California Automobile Franchise Act conflicts with the antitrust laws of the United States.*

Analysis of plaintiffs' "Supremacy-antitrust" claim requires the immediate observation that plaintiffs' position assumes that the State action in question herein can be validly compared to private action under the federal antitrust laws. As is more fully discussed in section C-3 of this Part, *infra,* this assumption is mistaken. For the limited purpose of exploration of plaintiffs' contention upon its own terms, however, the present discussion hereinafter assumes the purposefulness of such a comparison without conceding its validity.

The issue presented by plaintiffs' contention is whether the Act, by subjecting an otherwise unilateral and vertically-imposed decision of plaintiff General Motors to limited independent scrutiny by a state

tribunal constitutes a violation of the federal antitrust laws.

Plaintiffs' contention that the California Automobile Franchise Act conflicts with the federal antitrust laws rests squarely and exclusively upon a supposed similarity between the facts found in *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* 521 F.2d 1230 (3d Cir. 1975) and the provisions of California Vehicle Code section 3062.

In *American Motor Inns, supra,* it was found that Holiday Inns, Inc., a franchisor of 1099 independently owned and operated motor lodges throughout the country, engaged in the following practice upon receipt of an application for a franchise:

> "The normal HI [Holiday Inn] procedure upon receiving an application for a franchise was to send written notices of the application—referred to as radius letters—to at least the three Holiday Inns nearest the proposed location. The recipients of the radius letters were invited to forward to HI their written comments on the application, but were under no obligation to respond. Any replies to the radius letters received by HI were referred to the Franchise Committee, which then reviewed the application." 521 F.2d at 1236.

Plaintiffs' comparison of the Act's procedures with those employed by Holiday Inn is, up to the last point described in the foregoing narrative, reasonably accurate. Though plaintiffs are mistaken in asserting that the New Motor Vehicle Board plays the role of Holiday Inn insofar as notification and invitation to comment are concerned, it is the Board which is

the statutory recipient of such "replies"—that is, protests—as may be made by franchisees in response to the notification of the franchisor.

At this point, however, *American Motor Inns* and the present case part company, for the facts as found by the court in the former case are so vastly dissimilar from the statutory procedures of the New Motor Vehicle Board as to preclude further comparison.

In *American Motor Inns:*

> "[T]he district court found that if, as a result of the radius letters, HI received an objection to the proposed franchise by an existing franchisee, the only definitive action the [Holiday Inn] Franchise Committee could take was to deny the application. It could not approve the application. Once an objection had been lodged, the franchise could be awarded only by the Executive Committee of the Board of Directors of HI. According to the trial judge, in order for the Executive Committee to consider an objection by any existing franchisee, the Franchise Committee must already have recommended that the franchise be granted. In 1972 the Executive Committee reviewed 75 applications for franchises to which one or more existing franchisees had objected, and denied 43 of them. The trial court found as a fact that 'these 43 applications would have been granted but for objections from existing franchisees.'" 521 F.2d at 1236 (footnote citation to District Court opinion omitted).

The policy employed by Holiday Inn in connection with new applications was thus affected with the

following characteristics. The receipt by the Franchise Committee of an objection from an established franchisee resulted in either an outright denial of the application at that level or a non-definitive approval of the application by that Committee. Only in the latter case would the Executive Committee have occasion to consider the application and a majority of the applications so considered was denied.

In contrast, upon receipt of a protest by a franchisee under California Vehicle Code section 3062 the New Motor Vehicle Board informs the franchisor that the latter may not proceed with its proposed establishment or relocation until a hearing has been held and the issues of good cause have been determined by the Board. California Vehicle Code § 3062; see Complaint Exhibits D, E, H, K, & L. Thereafter a hearing is held by the Board pursuant to administrative procedures not challenged here.

In each case brought before it upon a protest filed pursuant to Vehicle Code section 3062, the Board determines upon the basis of the criteria specified in section 3063 whether the protestant has demonstrated that good cause exists for *not* permitting the proposed action of the distributor. Section 3063 requires consideration of existing circumstances such as permanency of investment, injury to the public welfare, effect on the retail motor vehicle business and the consuming public in the area, and:

> ". . . (4) Whether the franchisees of the same line-make in that relevant marketing area are providing adequate competition and convenient

consumer care for the motor vehicles of the same line-make in the market area. . . .

"(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest." Cal. Veh. Code § 3063.

It is only in the event that the Board determines good cause to exist for not permitting the proposed action that any limitation upon establishment or relocation of any franchise arises. A single decision, final upon filing, is issued within the time limits specified by the statute. A failure by the Board to act within the specified time limits results in approval of the franchisor's proposed action. Cal. Veh. Code § 3067.

Thus, notwithstanding plaintiffs' assertion that the similarity between the *American Motor Inns* facts and the procedures established by the Automobile Franchise Act is "apparent" (P.S.J. 29:21-23), the foregoing review discloses the following fundamental dissimilarities.

First, while the Holiday Inn procedure precluded a grant of a franchise by the Franchise Committee—the body which would otherwise authorize the franchise—a protest by a franchisee under the Act operates not to divest the Board of any decision making authority, but rather occasions the exercise of that authority. Cal.Veh. Code § 3050(d).

Second, under the Holiday Inn procedure the only definitive action which the Franchise Committee could

take after receipt of an objection was to deny the franchise application. The Board's authority to approve the dealer's proposed action, on the other hand, is never foreclosed by any act of the protesting franchisee.

Third, the Holiday Inn procedure, which resulted in divestiture of all power in the Franchise Committee to grant a franchise if an objection had been received, permitted the Franchise Committee only to make a recommendation to a higher level of authority in the event it disagreed with the objection. Under the Act, the decision of the Board—whether it approves or disapproves the franchisor's proposed action—is itself administratively final, and subject to review only by the courts. Cal.Veh.Code § 3068.

Fourth, the Holiday Inn procedure requiring a higher level of authority—the Executive Committee—to consider objections when the Franchise Committee disagreed, was found factually by the trial court to result in a majority of the "objected-to" applications being finally denied at that level. Thus, if an "objected-to" franchise application were not denied by the normal franchising authority after receipt of the objection, the application was nonetheless likely to be denied at the higher level to which it would then pass for review. By contrast, in addition to the fact that plaintiffs point to absolutely no facts even suggesting that the New Motor Vehicle Board has any tendency to disapprove more proposed establishments or relocations than it approves, the Act itself requires that the proposed action of the franchisor be deemed

approved if the Board fails to act within the time limits established by California Vehicle Code section 3067. Thus, unlike the Holiday Inn procedure which resulted in a great likelihood of ultimate disapproval once an objection was filed, the California Act itself contemplates ultimate approval of the proposed action in the absence of a Board decision disapproving the action.

The only similarity which the *American Motor Inns* facts can be fairly said to share with the provisions of the California Automobile Franchise Act is that the franchisee objections in *American Motor Inns* and the dealer franchisee protests under the California act issue, if at all, from established franchisees within a given geographical area. Even on this point of comparison, similarity is limited, for two important distinctions are present.

First, the Third Circuit opinion in *American Motor Inns* indicates that the Holiday Inn procedure was to notify existing franchisees "upon receiving an application" (521 F.2d at 1236), that is, before any action by Holiday Inn's Franchise Committee was undertaken at all.[11]

Thus, unlike the Act's protest procedure (and overlooking for the moment the fact that it is the

[11]The reported findings of fact of the District Court (365 F.Supp. 1073 D. New Jersey, 1973) confirm the sequence involved:

> "17. All responses to radius letters are reported to the Franchise Committee of HI by the Franchise Sales Department when an application for a new franchise is submitted to that committee."

365 F. Supp. at 1079.

Board, rather than the franchisor, which receives the franchisee protest under the Act), Holiday Inn's policy permitted franchisees to act to foreclose new competition by objecting before any franchisor action was proposed or even contemplated. In contrast, the California act permits protests only remedially, in response to proposed franchisor actions of which the franchisee has notice. Cal.Veh. Code § 3062. Thus the Holiday Inn practice, which permitted prophylaxis, in effect, against competition in its most embryonic and incipient form, may have warranted the status assigned it by the Third Circuit as a *per se* violation of the Sherman Act (5 U.S.C. § 1), where practices under a private procedure more comparable to California's would not: it is, of course, precisely the anticipatory stifling of incipient competition which characterizes those territorial market practices for which the Supreme Court has reserved the designation of "*per se* unreasonable." *United States v. Topco Associates,* 405 U.S. 596, 607 (1972); *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 5 (1958).

A second and related distinction consists in the fact that all objections involved in *American Motor Inns* were in opposition to the grant of franchises (521 F.2d at 1236), that is, establishment of new franchises (See 365 F.Supp. 1073, 1089, 1090), and as such were affected in all cases with either the purpose, or the effect, or both of preventing competition. No such conclusion is possible in respect to the California act's operation upon the present record, for plaintiffs have proved neither the purpose of protest-

ing franchisees to prevent competition, nor the existence of anticompetitive effect resulting from franchisee action.

Thus the similarity between the Holiday Inn policy and the California Automobile Franchise Act's procedures, urged on the basis of franchisee initiation protest mechanisms, if superficially apparent, is far from real. On the record before the Court it simply cannot be said whether operation of the California act results, in *any* case, in anticompetitive effect, much less that a *per se* violation of the Sherman Act is present. Territorial limitations, if vertically imposed, do not constitute *per se* violations and, because they may or may not have the purpose or effect of restraining competition, are subject to analysis under the "rule of reason." *White Motor Co. v. United States,* 372 U.S. 253, 261-263 (1963). The Automobile Franchise Act does not, by interposing the police power of the State between conception and fructification of such otherwise vertically-imposed business decisions of plaintiff General Motors, give rise to a violation of the Sherman Act.

3. *Plaintiffs' claim of conflict with federal antitrust law is unsupported by any legal justification or factual basis and is wholly inadequate to justify summary judgment.*

   a) Plaintiffs request the Court impermissibly to infer a conflict upon the basis of merely speculative possibility of potentially unlawful conduct.

The Supreme Court's discussion of its refusal to find a clear conflict in *Seagram & Sons v. Hostetter, supra,* 384 U.S. 35 (1966) is highly instructive in evaluation of the case advanced by plaintiffs in support of the present motion for summary judgment. The Court in *Seagram & Sons* initially noted that the challenged State statute imposed "no irresistable economic pressure on appellants to violate the Sherman Act" 384 U.S. at 45. The Court went on to hold that although it was "possible to envision circumstances" under which antitrust violations might be compelled by the New York statute, "the existence of such potential conflicts is entirely too speculative in the present posture of this case to support the conclusion that New York is foreclosed from regulating liquor prices in the manner it has chosen" 384 U.S. at 46.[12]

Examination of the posture of plaintiffs' case discloses the very same deficiencies generally identified by the Supreme Court in refusing to find the New

---

[12]Lest the suggestion appear that the Court placed its rejection of the antitrust conflict claim upon the Twenty-First Amendment, or that that holding should be delimited by recognition of the scope of state power to regulate liquor under that Amendment, it should be noted that the Court in the *Seagram & Sons* opinion specifically observed:

> ". . . [the challenged provision of the New York statute] appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. *Nothing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act against such a conspiracy.* United States v. Frankfort Distilleries, 324 U.S. 293, 299."

384 U.S. at 45-46, emphasis supplied.

York statute in conflict with federal antitrust law in *Seagram & Sons, supra,* for plaintiffs' claim of inconsistency of the California act with federal antitrust law is devoid of legal or factual support. Rather, it is on the basis of speculation, and on this basis alone, that plaintiffs ask the Court to impermissibly infer a conflict with "the operation and underlying economic policy of the federal antitrust laws". Proposed Findings of Fact & Conclusions of Law (Proposed Conclusion of Law No. 4) 13:14-17.

As discussed in the immediately preceding section of this Part, plaintiffs' attempted comparison between the provisions of the California Automobile Franchise Act and the facts of the *American Motor Inns* decision—the sole authoritative factual discussion on which plaintiffs rely to support their claim of the Act's invalidity as a horizontal market restraint—fails in at least six points. In particular, the role of the established franchisee as protestant under the Act is on the present record so lacking in evidentiary articulation of purpose and resulting anticompetitive effect as to make impossible any meaningful determination upon the question whether restraint of trade has occurred. In this connection the *per se* rule to which plaintiffs allude (P.S.J. 27:29-28:9) would not, in an action based upon private conduct, relieve the plaintiff of thee (sic) necessity of establishing anticompetitive effect unless that conduct itself fell within the limited class of practices which themselves constitute *per se* violations of the Sherman Act. See, e.g., *United States v. Socony Vacuum Oil Co.,* 310 U.S.

150 (1940) (price fixing agreements); *United States v. Topco Associates,* 405 U.S. 596 (1972); *United States v. Sealy, Inc.,* 388 U.S. 350 (1967) (horizontal market division agreements); *Radiant Burners, Inc. v. People's Gas Light & Coke,* 364 U.S. 656 (1961) (group boycotts, or concerted refusals to deal) but see, as holding group refusal to deal not a *per se* illegal boycott, *McQuade Tours v. Consolidated Air Tour Manuel Committee* (5th Cir. 1972) 467 F.2d 178, cert. den. 409 U.S. 1109). Because the record is barren of any proof covering the nature of the acts of protesting franchisees or any party to this action as purportedly constituting anticompetitive conduct, reference to the *per se* rule in argument (P.S.J. 28:1-9) adds nothing to plaintiffs' position. In the absence of any evidentiary basis sufficient to invoke the *per se* rule to plaintiffs' benefit, the present record is *a foritori* insufficient to support judgment for plaintiffs under the "rule of reason" analysis to which market allocation decisions are normally subject. *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963). See *United States v. Arnold Schwinn & Co.,* 388 U.S. 365, 376 (1967).

The statute which is before the Court contemplates no allocative purpose of competitors, either among themselves, horizontally, or as between themselves and their franchisor. Rather, in recognizing the reality of commercial disagreement and dispute which attends the otherwise unilateral and vertically-imposed decisions respecting sites of franchise establishments and relocations, and in resolving to apply

the police power to that aspect of the new motor vehicle business, the California legislature provided that the authority of the franchisor to impose such decisions would no longer be exclusive but would, in disputed cases, henceforth be exercised subject to absence of disapproval by the State. Evidencing no purpose to minimize competition, the statute mandates the New Motor Vehicle Board to examine the proposed action of the franchisor under five specified criteria, as applicable to the case before it, and provides for no prohibition on the proposed action unless it is demonstrated by the protestant that good cause exists for not permitting the action.

Considering the present summary judgment motion in light of the foregoing, it must be concluded that the conditions precedent to a finding of invalidity under the Supremacy Clause of Article VI have not been met. As in *Seagram & Sons, supra,* no pressure, irresistable or otherwise, to violate the Sherman Act is brought to bear by the provisions of the California Automobile Franchise Act. Moreover, even though it might be possible, as in *Seagram & Sons, supra,* "to envision circumstances" in which antitrust violations might occur (384 U.S. at 46), their existence has not been shown. Indeed, the Court in *Seagram & Sons, supra,* refused to find such a conflict even while conceding the possibility that circumstances could exist in which antitrust violations might be *compelled* by the challenged state statute. 384 U.S. at 46. In the present case, nothing in the law, the record, or plaintiffs' argument suggests even the remotest possibility

that the Act might compel conduct made illegal by federal antitrust law.

b) The acts of defendants undertaken pursuant to and in effectuation of the terms of the California Automobile Franchise Act do not violate the prohibitions of the Sherman Act.

Even if the Court were to conclude that violation of the federal antitrust laws were anything other than a mere possibility under the California Automobile Franchise Act, this conclusion would not render the acts of the defendants under the statute a violation of the Sherman Act. In *Parker v. Brown,* 317 U.S. 341 (1943) the Supreme Court examined the contention that the California Raisin Proration Act, which authorized establishment of marketing programs by state officials upon the petition of ten producers within a given zone, to restrict competition among the growers and maintain prices in distribution to packers. The Court noted that "[t]he declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state". 317 U.S. at 346. Rejecting the claim that the Sherman Act had been violated, the Court specifically assumed that the program would have violated the Sherman Act if organized and effectuated solely by a contract, combination or conspiracy of private persons. 317 U.S. at 350. The Court then stated.

"But it is plain that the prorate program here was never intended to operate by force of indi-

vidual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-351.

Observing that the Sherman Act made no mention of the state as such, the Court observed that there was no suggestion of a purpose to restrain State action in the Act's legislative history. Thus, the Court concluded:

". . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . .

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

Plaintiffs argue, however, that *Parker* does not exempt the present state action from the reach of the Sherman Act "because the state statute involved [in *Parker*] was consistent with a clearly expressed national policy." P.S.J. 31:5-9. Citing *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C.Cir. 1971), cert. den. 404 U.S. 1047, plaintiffs assert that the basis for the *Parker* holding rested on recognition that Congress had already enacted the Agricultural Adjustment Act, with which the California regulation was consistent, and which was itself inconsistent with the antitrust statute. P.S.J. 31:13-30, citing 444 F.2d at 936.

The fallacy of this assertion consists in the assumption that consistency of the California regulation with the federal Agricultural Adjustment Act formed a part of the *Parker* court's analysis of the Sherman Act question. In reality, consistency of the California program with federal agricultural legislation forms no part of the Court's discussion of the antitrust claim; in fact, it was only in response to the additional challenge that the California program conflicted with and was superseded by federal agricultural marketing legislation that the Court had any

occasion to consider the question of consistency of the state program with the Agricultural Adjustment Act. This issue was addressed (317 U.S. at 352-359) only after the antitrust challenge had already been resolved (317 U.S. at 352); and no discussion of any inconsistency between the federal agricultural and antitrust acts appears in the Court's analysis of either claim.

In its most recent explication of the *Parker* holding, the Supreme Court in *Cantor v. Detroit Edison Co.*, No. 75-122, 44 L.W. 5357 (announced July 6, 1976) makes it clear that the limiting explanation of the *Parker* rule, espoused by plaintiffs in reliance on *Hecht, supra,* is unjustified.

In *Detroit Edison* the Court addressed a private action against a state regulated utility which, in addition to providing electricity, supplied light bulbs to its customers without separate charge, pursuant to tariffs filed and approved by the State. As a defense to the private action against the utility alone, alleging restraint of competition in the sale of light bulbs in violation of the Sherman Act, Edison argued that because its tariffs were approved by the State of Michigan and could not be revised to discontinue its lamp supply program unless the State likewise approved the revision, its program was exempt from antitrust attack under *Parker v. Brown.* Denying the defense, the Court's decision reflects the independence of *Parker's* antitrust holding from the extraneous limiting considerations asserted by plaintiffs. In a

plurality opinion by Mr. Justice Stevens, the Court flatly stated:

> "The Court [in *Parker*] held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act[21]"

44 L.W. at 5360. (Footnote[21] reciting relevant language from *Parker,* omitted.) Pointing out that in the case then before it, unlike *Parker,* the only defendant was a private utility, and that there was no claim that any state action violated the antitrust laws, the Court held that "[s]ince the case now before us does not call into question the legality of any act of the State of Michigan or any of its officials or agents, it is not controlled by the *Parker* decision." 44 L.W. at 5361.

The present case, on the other hand, is squarely within the holding of *Parker v. Brown, supra.* The New Motor Vehicle Board, its members and its executive secretary, the Department of Motor Vehicles and its Director, are of course all entities and officials of the State of California. It is an act of the State of California which is challenged by this action. As was explicitly recognized by the Court in *Cantor, supra,* ". . . the only way the legality of any program can be tested under the Sherman Act is by determining whether the persons who administer it have acted lawfully." 44 L.W. at 5363. No act of defendants complained of in the present case has occurred other

than by virtue of the California statute. Nor is there present, under the Act or by virtue of any official conduct here in question, any attempt to confer antitrust immunity upon private action otherwise violative of the Sherman Act, and no such violation has been established by plaintiffs.

Thus insofar as plaintiffs seek to restrain acts of the defendants undertaken pursuant to the California Automobile Franchise Act, as constituting participation in a program allegedly violative of the Sherman Act (P.S.J. 33:19-28), the attempt must fail under the rule of *Parker v. Brown.*

IV

Absence of a statutory requirement of a hearing prior to or in close temporal proximity to initial administrative action by the new motor vehicle board does not deny plaintiffs due process of law

A. *Synopsis of Plaintiffs' Contentions*

Plaintiffs' contentions as to the law and the facts upon which their claim of lack of due process is founded, are best identified by plaintiffs' responses to interrogatories propounded by defendants herein. In defendants first interrogatories each plaintiff was requested to state whether it contended that it had been deprived of property or protected constitutional rights without due process of law under the California Automobile Franchise Act. Each plaintiff responded affirmatively. Plaintiffs were each asked, in connection with their affirmative responses:

First, to identify each property or form of property of which plaintiff asserted it had been deprived;

Second, to identify each protected constitutional right of which plaintiff asserted it had been deprived; and

Third, to state each fact upon which plaintiff bases its contention that it has been deprived of property and/or protected constitutional rights without due process of law under the California Automobile Franchise Act.

(Defendants' First Interrogatories, Interrogatories 2(a), (b), (c).)

Plaintiffs answered, without specific objection but under a general objection for lack of relevance set out in the preamble to their respective Answers to Interrogatories, as follows.

General Motors Corporation:

"Answer and Objection to Interrogatory No. 2

"Plaintiff General Motors interprets this Interrogatory as one addressed to the claim for relief stated in paragraphs 23-27 of the Complaint herein ('Failure to Provide Prompt Hearing'), and answers accordingly.

"a) The Act has impaired plaintiff's right to engage in the lawful business of motor vehicle manufacture, assembly and distribution in California; deprived plaintiff of the benefits that would have been derived from the establishment or relocation of retail automobile franchises to

serve the marketing needs of General Motors and the sales and service needs of the public; and caused plaintiff to incur and pay substantial out-of-pocket expenses.

"b) Plaintiff was deprived of the rights identified in the answer to subpart (a) of this Interrogatory by the Board's issuance of an injunction against the establishment or relocation of motor vehicle franchises without prior notice and the opportunity to be heard. For this reason, and because of the Act's failure to require a prompt hearing thereafter, plaintiff has been deprived of rights guaranteed to it by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and other constitutional provisions.

"c) The operation of the Act has deprived plaintiff of property and protected Constitutional rights without due process of law because, under the Act, the Board is required to issue an injunction against the establishment or relocation of a motor vehicle franchise immediately and automatically following the application therefor by any franchised dealer for the 'same line-make' of motor vehicles whose dealership is located within ten miles of the new or relocated dealership. The Act denies due process because it fails to provide for notice and an opportunity to be heard prior to the issuance of such injunctions, and because it fails to require a prompt hearing thereafter."

"General Motors' Answers and Objections to Defendants' First Set of Interrogatories," pp. 5, 6 (dated June 30, 1976).

Orrin W. Fox Co.:

"Answer and Objection to Interrogatory No. 2

"Plaintiff Fox interprets this Interrogatory as one addressed to the claim for relief stated in paragraphs 23-27 of the Complaint herein ('Failure to Provide Prompt Hearing'), and answers accordingly.

"a) The Act has deprived plaintiff of the right to engage in business as a franchised dealer for Buick & Opel automobiles in Pasadena; deprived plaintiff of the benefits that would have been derived from said franchised dealership; caused plaintiff to incur and pay substantial out-of-pocket expenses; and caused plaintiff to suffer significant damage to its excellent business reputation in the Pasadena Community.

"b) Plaintiff was deprived of the rights identified in the answer to subpart (a) of this Interrogatory by the Board's issuance of an injunction against the establishment of a Buick & Opel motor vehicle franchise without prior notice and the opportunity to be heard.

"Orrin W. Fox Co.'s Answers and Objections to Defendants' First Set of Interrogatories," pp. 4, 5 (dated July 6, 1976).

The remainder of plaintiff Fox's answer to subpart (b), and said plaintiff's answer to subpart (c) of Interrogatory No. 2 are identical to the answers of plaintiff General Motors Corporation to those subparts and are omitted in the interest of brevity.

Muller Chevrolet:

"Answer and Objection to Interrogatory No. 2

"Plaintiff Muller interprets this Interrogatory as one addressed to the claim for relief stated in paragraphs 23-27 of the Complaint herein ('Failure to Provide Prompt Hearing'), and answers accordingly.

"a) The Act has deprived plaintiff of the right to engage in business as a franchised dealer for Chevrolet cars and trucks in new and larger quarters in LaCanada, California; deprived plaintiff of the benefits that would have been derived from increased motor vehicle sales and service in said new quarters; and caused plaintiff to incur and pay substantial out-of-pocket expenses.

"b) Plaintiff was deprived of the rights identified in the answer to subpart (a) of this Interrogatory by the Board's issuance of an injunction against the relocation of its motor vehicle franchise without prior notice and the opportunity to be heard. . . ."

"Muller Chevrolet's Answers and Objections to Defendants' First Set of Interrogatories," pp. 4, 5 (dated July 1, 1976).

The remainder of plaintiff Muller's answer to subpart (b), and its answer to subpart (c) of Interrogatory No. 2 are, like the responses of plaintiff Fox, identical to the answers of plaintiff General Motors Corporation to those subparts and are omitted in the interest of brevity.

In substance, each plaintiff asserts what amounts to an interference with a business expectancy, toward

realization of which out-of-pocket expenses had been incurred and paid. In General Motors Corporation's case, "impairment of the right to engage in the lawful business of motor vehicle manufacture, assembly and distribution in California" is asserted in addition to the expectancy of benefits which would have been derived from more immediate realization of its proposed actions. In plaintiff Fox's case, deprivation of the right to engage in business as a franchised dealer for Buick and Opel automobiles in Pasadena, and of attendant benefits, is identified. Plaintiff Muller asserts deprivation of the right to engage in business as a Chevrolet franchisee in new and larger quarters in LaCanada, and of attendant benefits.

The respective plaintiffs each assert the foregoing interferences as impairments and deprivations of rights which result from issuance of "an injunction" by the New Motor Vehicle Board without prior notice and opportunity to be heard. Each plaintiff asserts that the California Automobile Franchise Act denies due process because it fails to provide for notice and opportunity to be heard prior to such issuance, and fails to require a prompt hearing thereafter.

B. *The Action of the New Motor Vehicle Board Required to be Taken Upon the Filing of a Protest Under the California Automobile Franchise Act, Does Not Constitute Issuance of an Injunction Against Plaintiffs.*

Since at least as early as the Supreme Court's decision in *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935), it has been established that state regulation of business, even when it

constitutes an intrusion into the manner in which an individual may practice his profession, does not itself amount to "an arbitrary interference with liberty and property and thus violate the requirement of due process of law." 294 U.S. at 611. So well settled is the foregoing proposition that again, as early as 1955, the Court held unequivocally that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted]" *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955), reh.den. 349 U.S. 925.

Plaintiffs purport, however, to raise something more than objection merely to the fact of regulation itself, and assert that such inconvenience as occurs to their ability to conduct their respective businesses is violative of due process by reason of the administrative event by which the authority of the New Motor Vehicle Board is interposed into plaintiffs' business affairs.

Specifically, plaintiffs' contention that the California Automobile Franchise Act deprives them of property without due process of law rests principally upon characterization of one step in the regulatory scheme as "issuance of an injunction." This characterization is misconceived. Defendants submit that when the challenged administrative step is properly identified and recognized for what it is, plaintiffs' motion for summary judgment upon this due process claim as a question of law alone must fail.

The challenged regulatory step which plaintiffs erroneously label "an injunction" is constituted by that action which California Vehicle Code section 3062 requires the New Motor Vehicle Board to take upon the filing of a protest against the franchisor's proposed establishment or relocation of a dealership. The action mandated by the language of that section is as follows:

> "When such a protest is filed, the Board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the Board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership." Cal.Veh. Code § 3062.

It is thus the Legislature, and not the Board, which has identified the necessity for delay pending further inquiry, and the circumstances under which that necessity is deemed to arise.

The Board action mandated by Section 3062 thus constitutes notification to the franchisor of the legislatively-determined necessity for delay attendant upon the Board's inquiry, and, as recited in the notifications made in this case (Complaint Exhibits D, E, H, K, and L), requires that the franchisor defer consummation of its proposed action until such time as the Board has inquired into the matter and resolved the issues of public interest articulated as good cause under Section 3063.

It is only after subsequent inquiry, constituted by notice and hearing upon the issues of good cause, that any order issues which can be fairly characterized as an "injunction." That order, constituted by the Board's written decision which is final upon announcement (Cal.Veh. Code § 3067), has injunctive effect against the proposed action only if the Board has determined that good cause exists for not permitting the franchisor's proposed action and acts within the time limits of Section 3067. In all other cases the franchisor's proposed action is deemed approved. *Id.*

C. *Even if it is Assumed, Arguendo, That Plaintiffs are Deprived of Substantial Interests by the Operation of the California Automobile Franchise Act, Plaintiffs are not Denied Due Process of Law by the Absence of a Statutory Requirement of a Hearing Prior to Initial Board Action.*

It has long been established, in treating of regulatory measures enacted in aid of the public interest, that when a hearing is required under administrative procedures:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding *so long as the requisite hearing is held before the final order becomes effective." Opp Cotton Mills v. Administrator of Wage & Hour Division,* 312 U.S. 126, 152 (1941). Emphasis supplied.

In *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) reh.den. 340 U.S. 857, the Supreme Court

elaborated on the requirements of due process as they affect the timing of a hearing where administrative discretion, as opposed to ministerial adherence to the statutory requirement involved in the present case, was authorized. In addressing the discretion vested in an administrator to effectuate an outright seizure of property incident to commencement of judicial enforcement proceedings, the Court stated:

> "Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. *It is sufficient, where only property rights are concerned, that there is at some stage an opportunity and a judicial determination* [Citations omitted]" 399 U.S. at 599. Emphasis supplied.

In the case before the court, of course, the challenged statute provides for an adjudicatory hearing prior to any final action by the New Motor Vehicle Board. Moreover, no discretion is exercised by the administrative agency in effectuating the explicit command of the staute (sic).

In their attack upon the absence of a statutory provision of a hearing prior to administrative notification of the prohibition on consummation of plaintiffs' business relations defendants rely principally upon reference to *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969), *Boddie v. Connecticut,* 401 U.S. 371 (1971) and *Fuentes v. Shevin,* 407 U.S. 67 (1972), as requiring a hearing prior to deprivation of any significant property interest. These cases, however, are not inconsistent with the holdings in *Opp Cotton*

Mills, supra, and *Mytinger and Casselberry, supra.* In *Sniadach, supra,* the Court specifically observed:

> "We deal here with wages—a specialized type of property presenting distinct problems in our economic society." 395 U.S. at 340.

The Court then discussed the problems presented by the Wisconsin garnishment statute in light of the nature of that specialized type of property and, concluding, noted:

> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall.[9]

[9] 'For a poor man—and whoever heard of the wages of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat . . .' Congressman Gonzales, 114 Cong.Rec. 1833 . . ."

395 U.S. at 342. Moreover, as was pointed out in the concurring opinion of Mr. Justice Harlan, no justification founded in the regulatory interest of the State was advanced in support of the Wisconsin statute.

Boddie, supra, involved no special species of property, but rather the institution of marriage and the right of access to the courts as the sole means available to effect its dissolution.

Fuentes v. Shevin, supra, involved facts more akin to the *Sniadach* case. In *Fuentes,* the Court confirmed the right to a hearing prior to seizure of household goods under judicial process. Invalidating the Florida and Pennsylvania replevin statutes under the Due Process Clause for failure to provide for such a hearing, the Court stated that it is an "important

interest," citing *Sniadach, supra,* 395 U.S. at 539, and not only a "necessary" one, which it held to be protected. 407 U.S. at 90. In *Fuentes,* as in *Sniadach,* the Court made it clear that it deemed the state statutes in question to serve no important governmental or general public interest and, pointing to *Ewing v. Mytinger and Casselberry, Inc., supra,* confirmed that when necessary to secure an important governmental or general public interst (sic), even outright seizure need not necessarily be preceded by a hearing. 407 U.S. at 90-92.

Sniadach and *Fuentes,* then, treat of the necessity of a hearing prior to deprivation when dealing with "important interests" of private persons in the absence of important governmental or general public interest. *Boddie* dealt with the right of a hearing *per se* in the case of persons forced to settle their claims through judicial process and confirmed that right, over the state's minimal interest in fees and costs. 401 U.S. at 382.

The law governing the present case would therefore be unadumbrated by the decisions alluded to by plaintiffs even if it were conceded—as defendants do not concede—that even a seizure of property were the result of the statute; for the police power of the state, having been interposed into the business of motor vehicle retail sales by the public interest as found by the legislature (Cal.Stats. 1973, ch. 996, § 1) results in no deprivation of any substantial interest of plaintiffs unless and until a final determination has been made, following a hearing, that

good cause therefor exists. At bottom, the cognizable interest of plaintiffs which is interfered with by those initial, pre-hearing actions of the Board under the statute, is the expectancy of continued conduct of their business relations unfettered by the regulatory hand of the State. That expectancy is one which plaintiffs simply have no right to entertain. *Williamson v. Lee Optical, supra,* 348 U.S. at 486-488.

D. *The Inconvenience to Plaintiffs Occasioned by Necessity of Compliance With the Terms of the California Automobile Franchise Act Does Not Work a Deprivation of Due Process.*

The injury claimed by plaintiffs as a result of operation of the California Automobile Franchise Act centers upon the economic hardship involved in being at present unable to commence sales of a specific linemake of new motor vehicles at their proposed locations. Obviously, the lost benefits of business which might have been transacted but for the necessity of compliance with regulatory requirements attends most, if not all, proposed ventures which are subject to state inquiry prior to commencement of business.

By way of example only, prior to establishment of a bank or trust company within the State, California has long required "careful investigation and examination" to be made by the Superintendent of Banks relative to specified factors concerning the character of the applicants and other specified factors concerning the community to be served by the institution proposed to be established, including competition offered by existing financial institutions and opportunities for

profitable employment of bank funds or fiduciary funds and opportunities for profitable employment of fiduciary services. Cal.Fin.Code § 361. The Superintendent is also authorized to consider "[s]uch other facts and circumstances bearing on the proposed bank or trust company and its relation to the locality as in the opinion of the superintendent may be relevant". Cal.Fin.Code § 361(f). The Superintendent is further required to withhold approval until seven specified evaluative criteria have, to his satisfaction, been met. Cal.Fin.Code § 361.

Similar investigative requirements obtain in regulation of the savings and loan industry by the Savings and Loan Commissioner, who is required to consider "all facts connected with the formation of the proposed association" and "whether the public convenience and advantage will be promoted by the formation of such association". Cal.Fin.Code § 5509.

In the case of both proposed banks and trust companies, the investigative inquiry mandated by the relevant statute pre-supposes a substantial modicum of preparatory effort by the initiator of the proposed enterprise. Assemblage of proposed officers, directors and stockholders of the bank or trust company is a functional prerequisite of an application to the Superintendent of Banks for authority to engage in banking. See Cal.Fin.Code § 361 subdivisions (a), (d), (e). The Savings and Loan Commissioner must similarly receive the articles of incorporation and by-laws of the proposed association prior to initiating his examination and investigation under California Finance

Code section 5509. The Commissioner is additionally required to hold a hearing upon the application unless mandatory grounds for refusal exist, and must give written notice of the hearing to each association existing in the State. Cal.Fin.Code § 5510. At the hearing any person may appear and show cause why the application should not be granted. Cal.Fin.Code § 5511.

Numerous provisions requiring deferral of realization of proposed actions pending administrative inquiry necessitated by the public interest, govern a variety of commercial undertakings. Again, by way of example only, comparable inquiry and comparable delay may be discerned pending hearings upon and inquiry into public interest considerations, by the Department of Transportation attendant on applications for permits to operate an airport at a particular site under Article 3, chapter 4, division 9 of the California Public Utilities Code (Cal.Pub.U.Code §§ 21661 *et seq*); by voluntary health area planning agencies incident to review of individual applications for proposed construction of new or additional hospitals. under Part 1.5, division 1 of the California Health and Safety Code (Cal.H & S Code §§ 437 *et seq.*); and by the Department of Alcoholic Beverage Control upon protests filed against applications for issuance of a license to engage in the sale of alcoholic beverages at a given location, under Articles 3 and 4, chapter 6, division 9 of the California Business and Professions Code (commencing with Cal.B & P Code § 23985).

The foregoing regulatory provisions for administrative inquiry into proposed action contemplate varying but substantial amounts of preparatory effort prior to initiation of administrative procedures. See Cal.Pub.U.Code §§ 21661.5, 21661.6, 21664 (airport construction or expansion); Cal. Health & Safety Code § 437.9 (hospital and related health facility construction and conversion); Cal. Bus. & Prof. Code §§ 23951-23953 (sale of alcoholic beverages).

The challenged provision is a component of a regulatory scheme which, like the foregoing statutory provisions, conditions the conduct of business upon satisfaction of legislatively-designated conditions. But unlike the necessary operation of the foregoing statutory provisions, no fixed modicum of preparatory effort or expenditure of resources by those regulated necessarily attends compliance with the franchisee notification provisions of the California Automobile Franchise Act. This is so because under the Act it is the franchisor, and the franchisor alone, which determines when it will makes its proposed action known to the New Motor Vehicle Board and existing line-make franchisees within the relevant market area. Cal.Veh.Code § 3062. Hence, insofar as the degree of injury allegedly suffered by plaintiffs is asserted in support of the substantiality of rights impaired (see Affidavit of Richard L. Fox 4:8-5:10; Affidavit of John Muller 10:19-11:22), the following facts are relevant and illuminative.

With respect to the proposed enfranchisment of plaintiff Fox, General Motors Corporation received

Mr. Richard L. Fox's "Application for Buick Selling Agreement" on July 15, 1974. Exhibit 18, Deposition of S. G. Gilliatt, Transcript 46:1-10. The only prospective location which Mr. Fox ever discussed and considered with General Motors' Buick Motor Division in connection with his application was his existing sales facility at 3456 Colorado Boulevard. Deposition of Richard L. Fox, Transcript 22:6-23:10. Yet it was not until April 1, 1975, that Buick first communicated with Mr. Fox concerning compliance with the notification provisions of the Act, which had been in effect since July 1, 1974. Exhibit 22, Deposition of S. G. Gilliatt, Transcript 45:4-19; Exhibit B, Deposition of Richard L. Fox, Transcript 10:28-11:4. On April 7, 1975, Mr. Fox responded to Buick's communication and advised Buick, in relevant part, as follows:

> "This is to advise that the Orrin W. Fox Co. has determined that it is our desire to accept the appointment without giving notice to existing Buick dealers located within a 10-mile radius of 3456 E. Colorado Boulevard.
>
> "We recognize the risk potential insofar as the California Dealer Relations Statute (AB-225, as amended) and are willing to accept those risks."

Exhibit C, Deposition of Richard L. Fox, Transcript 12:24-14:18. Plaintiff Fox was thereupon finally franchised by Buick as a Buick-Opel dealer effective May 2, 1975, without notice to existing franchises in the relevant market area. Affidavit of Richard L. Fox 2:1-5.

With respect to the relocation of plaintiff Muller's franchise, it was understood between plaintiff General Motors Corporation's Chevrolet Motor Division and Muller's predecessor in interest as early as October 1, 1973, that a relocation was a distinct possibility. Exhibit 15, Deposition of S. G. Gilliatt, Transcript 45:4-19. See Affidavit of John Muller 7:25-8:6. On July 1, 1974, the Automobile Franchise Act became effective. Following the effective date of the Act, Mr. Muller notified Chevrolet that plaintiff Muller intended to lease with option to buy, property located at 475 Foothill Boulevard in LaCanada. Exhibit C, Deposition of John A. Muller, Transcript 65:28-67:9. Though negotiations to occupy that location were not consummated on that occasion, Chevrolet viewed the location and expressed at least tentative approval. Deposition of John A. Muller 67:18-68:3. Pursuant to an agreement reached in September, 1975, however, the same location was secured in November of 1975. Exhibit B, Deposition of John A. Muller, Transcript 34:2-10. Again, Chevrolet expressed tentative approval. Muller Deposition, Transcript 34:11-35:18. Nevertheless, it was not until the very date of Chevrolet's final approval of plaintiff Muller's relocation that notice pursuant to California Vehicle Code section 3062 was given to the New Motor Vehicle Board and existing line-make franchisees. Exhibit 10, Deposition of S. G. Gilliatt, Transcript 45:4-19.

Thus, in the case of Fox, the subject of compliance with the notice provisions of the Act were not even addressed among the plaintiffs until the eve of Fox's

enfranchisement by Buick, and at the agreement of the plaintiffs Fox and General Motors, notice was not given by Buick under the provisions of Vehicle Code section 3062. In the case of Muller, General Motors through its Chevrolet Division gave notice of plaintiff Muller's relocation only on the very day of its final approval of that action, even though it had been the intention of Muller and Chevrolet to relocate the former's franchise to the Foothill Boulevard location for at least several months prior to that date.

The conclusion is therefore unavoidable that delay attending the necessity of notification is not a defect of the Act or the fault of defendants, but rather the result of the delay of plaintiff General Motors Corporation—whether calculated or not—in initiating compliance with the Automobile Franchise Act's provisions, for, as earlier observed, it is the franchisor and the franchisor alone which determines when its intended action will be the subject of notification under the statute.

Moreover, as is reflected in the Affidavit of Sam W. Jennings, filed herewith, such delays as have occurred subsequent to the filing of protests against the proposed actions involved in this case have not been occasioned by the defendant New Motor Vehicle Board, but have rather been the result of acts of General Motors, through its respective divisions, and of the other parties to the protest proceedings involved. In point of fact, in the case of plaintiff Fox's enfranchisement, at the time of the filing of two

protests against that action, Buick had still not provided notice to either protestant under California Vehicle Code section 3062. In that case, Buick provided no such notification until July 24, 1975, some two months after the protests were filed and approximately two weeks after the New Motor Vehicle Board had set the protests for hearing.

In the case of Muller Chevrolet, following the filing of protests, the Board on February 6, 1976, notified Chevrolet Motor Division of the requirement of California Vehicle Code section 3062 that Chevrolet not effect its proposed relocation pending hearings. On February 20, 1975, Chevrolet through its attorneys requested a 5-day hearing, whereupon the Board, three days later on February 26, 1976, tentatively assigned hearing dates of June 21 through 25, 1976 in accordance with Chevrolet's request, and such were the scheduled hearing dates as of April 13, 1976, the date the present action was filed by plaintiffs.

Neither the delay alleged by plaintiffs incident to the notification requirement of California Vehicle Code section 3062 nor the delay alleged in connection with the present protests involving plaintiffs can be deemed attributable to the New Motor Vehicle Board or any defect in the California Automobile Franchise Act. Plaintiffs have not been denied due process of law by reason of the absence of a statutory requirement for a hearing either prior to or in close temporal proximity to the commencement of administrative action by the New Motor Vehicle Board.

Conclusion

For the foregoing reasons it is respectfully submitted that plaintiffs' motion for partial summary judgment must be denied.

Dated: August 5, 1976.

Respectfully submitted,
Evelle J. Younger
Attorney General
/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board,
Jacaban, Jones, Barnes, Onesian,
Tuttle, Vandenberg and Jennings

APPENDIX

CALIFORNIA AUTOMOBILE FRANCHISE ACT

(California Vehicle Code §§ 3060-3069)

Article 4. Hearings on Franchise, Modification, Replacement, Termination, Refusal to Continue, Delivery and Preparation Obligations, and Warranty Reimbursement

(Added Ch. 996, Stats. 1973. Operative July 1, 1974)

(Amended Ch. 384, Stats. 1974. Operative July 5, 1975)

Termination of Franchise

3060. Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good

cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974 by terms of an urgency clause.

Good Cause

3061. In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably

provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Establishing or Relocating Dealerships

3062. In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership *within or into* ( )[1] a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of *his* intention to establish ( )[2] an additional dealership *or to relocate an existing dealership within or into* ( )[3] that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any *such* franchisee ( )[4] may file with the board a protest to the establishing or relocating of the ( )[5] dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed

dealership until the board has *held a hearing as provided in Section 3066, nor thereafter, if the board has* determined that there is good cause for not permitting such ( )[6] dealership. In the event of multiple protests, hearings *may* ( )[7] be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Amended Ch. 653, Stats. 1975. Effective January 1, 1976.

The 1975 amendment added the italicized material and at the point(s) indicated deleted the following:

[1]"in"
[2]"or relocate"
[3]"in"
[4]"receiving such notice"
[5]"proposed additional"
[6]"additional"
[7]"shall"

Good Cause

3063. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Delivery and Preparation Obligations

3064. (a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of such franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on such schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, providing a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that he has fulfilled these obligations.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Warranty Reimbursement

3065. (a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation.

The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other revelant criteria.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Hearings on Protests

3066. (a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer, designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515 and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicles dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Decision

3067. The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Judicial Review

3068. Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date

on which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Application of Article

3069. The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

United States District Court
Central District of California

No. 76 1200 WPG

[Title omitted in printing]

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Introduction

Upon careful review of the arguments advanced by plaintiffs in opposition to defendants' motion to dismiss, defendants deem extended reply unnecessary for resolution of the motion, which has already been argued at some length in defendants' original points and authorities submitted in support thereof. Defendants therefore take this opportunity only to invite the Court's attention to one recent decision of the United States Supreme Court, announced subsequent to the filing of plaintiffs' opposition herein, which defendants submit is relevant to this Court's consideration of the motion to dismiss under the doctrine of abstention.

Argument

THE DOCTRINE OF ABSTENTION IS NEITHER SO NARROW NOR SO EXTRAORDINARY AS TO PRECLUDE ITS APPLICATION TO THE PRESENT CASE

In *Bellotti v. Baird, et al,* and *Hunerwadel v. Baird, et al.,* Nos. 75-73 and 75-109, 44 L.W. 5221, (announced July 1, 1976), the Supreme Court reiterated the appropriateness of abstention in those cases where a state court interpretation of a state statute has not been afforded, when such interpretation would either avoid or substantially modify the constitutional challenge to the statute.

In the *Baird* case the Court considered the doctrine of abstention in the context of a challenge to a Massachusetts statute which it was claimed, created a "parental veto" over performance of abortions on minor children. Plaintiffs alleged, and the District Court held, that the statute violated the Equal Protection and Due Process clauses of the Fourteenth Amendment.

In holding that the District Court should have abstained from deciding the constitutional issue pending construction of the statute by the Massachusetts court, the Court pointed out that substantial variance existed between possible interpretations of the statute in its operation and that the statute, under interpretations other than that adopted by the District Court, would be "fundamentally different" from one having the effect ascribed to it by the three-judge federal forum. The Court stated:

> "In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the neces-

sity for federal constitutional adjudication, or at least materially change the nature of the problem.' *Harrison v. NAACP,* 360 U.S. 167, 177 (1959). See also *Colorado River Conservation District v. United States,* ..... U.S. ..... (slip op. 12-13) (1976); *Carey v. Sugar,* ..... U.S. ..... (slip op. 6) (1976); *Kusper v. Pontikes,* 414 U.S. 51, 54-55 (1973); *Lake Carriers' Assn. v. MacMullan,* 406 U.S. at 510-511 (1972); *Zwickler v. Koota,* 389 U.S. 241, 249 (1967); *Railroad Comm'n v. Pullman Co., supra.*" 44 L.W. at 5225.

In confirming the applicability of the language of *Harrison v. NAACP,* 360 U.S. 167, 177 (1959) to the case before it, the Court stated: ". . . [W]e think it clear that in the instant case adoption of appellants' interpretation would 'at least materially change the nature of the problem' that appellants claim is presented. *Harrison v. NAACP,* 360 U.S. at 177." 44 L.W. at 5225.

In addressing the necessity of abstention in such a case the Court specifically observed:

> "It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." 44 L.W. at 5226.

In consideration of the foregoing, for the reasons set forth in defendants' original points and authori-

ties in support of the motion to dismiss, and upon examination by the Court of the arguments filed by the parties in respect of plaintiffs' motion for partial summary judgment, the appropriateness of abstention in the present case should be manifest.

Conclusion

It is respectfully submitted that defendants motion to dismiss the action herein should be granted.

Dated: August 5, 1976.

Respectfully submitted,
Evelle J. Younger
Attorney General
/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General

Attorneys for Defendant New Motor Vehicle Board, Jacaban, Jones, Barnes, Onesian, Tuttle, Vandenberg and Jennings

United States District Court
Central District of California

No. 76 1200 WPG

[Title omitted in printing]

NOTICE OF JOINDER OF DEFENDANT DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS AS DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES IN MOTION OF DEFENDANT NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Department of Motor Vehicles of the State of California and Herman Sillas, sued herein as the Director thereof, hereby join in the motion of Defendant New Motor Vehicle Board of the State of California to dismiss the within action and in the Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment heretofore filed by said defendant New Motor Vehicle Board of the State of California.

Dated: Aug. 13, 1976

Evelle J. Younger
Attorney General

/s/ Stephen J. Egan
Stephen J. Egan
Deputy Attorney General
Attorneys for Defendants
Department of Motor Vehicles
and Herman Sillas, as Director
of the Department of Motor
Vehicles

(Service information omitted in printing)

United States District Court
Central District of California

No. CV 76 1200 WPG

[Title omitted in printing]

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Preliminary Statement

On June 7, 1976, plaintiffs moved this Court for a summary determination that the California Automobile Franchise Act ("Act"), violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because it deprives plaintiffs of liberty and property without prior notice and the opportunity to be heard; and, that the Act is invalid under the Supremacy Clause of the United States Constitution because it directly conflicts with the antitrust laws of the United States.

On August 5, 1976 defendant New Motor Vehicle Board ("Board") and the Members and Executive Secretary thereof, filed a Memorandum in Opposition to the Motion for Partial Summary Judgment. In that document, defendants have expended a great deal of effort to raise and argue a plethora of matters that are irrelevant to the narrow legal issues presented by the motion for partial summary judgment.

In view of defendants' lengthy detour into irrelevancy, it is necessary again to delimit the issues which are presented by the Motion and cull out those matters that are neither raised by nor relevant to the Motion.

II. The Issues Presented

Plaintiffs' two claims are both directed at the same specific portion of the Act: namely, that portion which allows an existing franchised automobile dealer to obtain a prehearing injunction of indefinite duration prohibiting the establishment or relocation of a competitive dealership within a 10-mile radius by doing no more than sending a simple letter of protest to the California New Motor Vehicle Board ("Board"). Plaintiffs' Motion is limited in scope, and deals only with the establishment and relocation provisions of the Act, the nucleus of which is California Vehicle Code § 3062; it is in this context only that plaintiffs have moved for a determination that the automatic injunction procedure violates the basic requirements of due process and operates in a manner contrary to the mandate of the Sherman Act.

Despite defendants' suggestions to the contrary, the following issues are *not* presented by the motion for partial summary judgment.

A. *There Is No Due Process Challenge to the Basic Regulatory Powers of the State*

Defendants suggest that plaintiffs' due process challenge to the Act constitutes an objection to the

principle of state regulation of the automobile industry itself. (Defendants' Memo. pp. 43-44). The suggestion is erroneous.

Plaintiffs' Motion does not challenge the authority of the State to effect *some* regulation of business. What plaintiffs do contend is that *when* the State undertakes to regulate, the imposition of its power must comport with the root requirements of constitutional due process.*

B. *The Present Motion Does Not Challenge Those Portions of the Act Which Deal With Modification, Termination, Warranty and Dealer Preparation Obligations*

Defendants' extensive exposition of the Act (Defendants' Memo. pp. 9-15) treats a number of provisions dealing with modification or termination of franchises, dealer preparation obligations and the implementation of warranties.

The validity of these provisions is not here at issue. Plaintiffs' challenge deals only with that part of the Act controlling the establishment and relocation of dealerships, the touchstone of which is Section 3062.**

---

*Accordingly, that portion of defendants brief and the two affidavits that deal with the necessity and propriety of state regulation are irrelevant to the issues now before the Court. (Defendants' Memo. pp. 5-8; Affidavits of Fred J. Lema and Robert W. Burgett in Opposition to Motion for Summary Judgment.)

**To the extent this Court may be concerned with the preservation of the termination, dealer preparation and warranty provisions, plaintiffs would invite the Court's attention to the "saving clause" set forth in Vehicle Code § 5.

C. *The Scenario Prior to the Filing of a Protest and the Events Leading to a Decision by the Board After a Hearing Are Not At Issue*

Defendants have devoted a significant portion of their brief regarding the due process issue to a synopsis of selected facts concerning the steps taken by the Orrin W. Fox Co. ("Fox"), Muller Chevrolet ("Muller") and General Motors Corporation ("General Motors") prior to General Motors' advising the Board and surrounding dealers of the proposed enfranchisement and relocation (Defendants' Memo. pp. 52-55); the manner in which the Board goes about making a decision *after* a hearing (pp. 12-15); and the propriety of a Board determination on the merits of a protest (Defendants' Memo. pp. 44-46). Defendants, having introduced these factual issues, erroneously assert that there is a need for more of the same. (Defendants' Memo. pp. 3-4, lines 17-3; 28-31).

Defendants' synopsis of the communications between Fox and General Motors concerning the enfranchisement of Fox and of the communications between Muller and General Motors concerning the proposed relocation, is totally irrelevant to the due process issue before the Court. The validity of Board determinations after a hearing are similarly extraneous. The only question presented under the Due Process Clause is whether the Constitution guarantees Fox, Muller and General Motors the right to notice and to some form of impartial hearing *before* the Board issues its prohibitory order.

D. *There is No Dispute About the Only Facts Which Are Necessary to a Determination of Plaintiffs' Motion*

The pivotal facts which are material to determining the issues raised by the present Motion and the propriety of summary judgment are set forth in plaintiffs' affidavits and are, in essence, as follows:

(1) Muller is an existing franchisee of the Chevrolet Motor Division of General Motors, and has been licensed as a motor vehicle dealer by the State of California;

(2) Operation of his dealership is the primary means whereby John Muller earns his livelihood;

(3) Fox is an existing franchisee of the GMC Truck and Coach Division of General Motors and of American Motors Corporation, and has been licensed as a motor vehicle dealer by the State of California;

(4) Operation of his dealership is the primary means whereby Richard Fox earns his livelihood;

(5) Pursuant to Vehicle Code § 3062, General Motors gave notice of its intention to approve the proposed relocation of Muller and of its intention to grant a Buick franchise to Fox;

(6) Two competitive Chevrolet dealers within the 10-mile statutory "relevant market area" of Muller's proposed relocation filed protests against that relocation, and two competitive Buick dealers who would also be competitors of Fox in the event Fox were allowed to sell and service Buicks, filed protests against that proposed enfranchisement;

(7) Upon receipt of those "protest letters" and as a routine matter of "ministerial adherence to the statutory requirement . . ." of Vehicle Code § 3062 (Defendants' Memo. p. 46, line 27) the Board issued orders prohibiting General Motors, Muller and Fox from going forward with the proposed actions; and

(8) The Board's prohibitory orders, backed up by the full panoply of the civil and criminal enforcement powers of the Department of Motor Vehicles, was summarily issued without notice or hearing of any kind and without any substantive scrutiny, review or consideration by any impartial governmental official.

Since defendants have either acknowledged or have failed to contravene by affidavit any of these fundamental facts, such facts must be deemed admitted by defendants pursuant to Rule 3(g)(3) of the Local Rules of the Central District. Hence, there can be no genuine dispute as to the crucial facts and plaintiffs' Motion must be determined as a matter of constitutional law on those facts.

Wtih these facts established, it is apparent that relief is needed here in order to protect the rights of plaintiffs to due process. The constitutional dimensions of the right to engage in lawful business have

been identified and examined by the Supreme Court in a series of decisions spanning the nearly half century between *Meyer v. Nebraska,* 262 U.S. 390 (1923) and *Goldberg v. Kelly,* 397 U.S. 254, 262 (n. 8) (1970). The right to notice and a hearing prior to suffering the deprivation of this, or any other substantial interest, has been repeatedly discussed by the United States Supreme Court in recent years. See, *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

E. *The Antitrust Consequences of a Board Determination on the Merits Are Not at Issue*

The question presented by the present motion concerns the anticompetitive effect of the absolute bar on establishment or relocation which is obtained, simply for the asking, by competitive dealers *prior* to notice and the opportunity to be heard. The question of what antitrust consequences may flow from the Board's deciding to sustain the protest and make the prohibition permanent, *after* notice and hearing, is not now before this Court. However, among the arguments presented by defendants in support of their position that the Act is not inconsistent with the federal antitrust laws, is an extensive discussion of how the Board, in considering and resolving protests, once notice and hearing is finally given, operates in a different manner than did the defendants whose activities were deemed to violate the Sherman

Act in *American Motor Inns v. Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975). (Defendants' Memo. pp. 20-27). This argument simply misses the mark.

The issue plaintiffs respectfully request this Court to resolve is whether the national economic policy reflected in the federal antitrust laws and made paramount by the Supremacy Clause, prevents the State from placing into the hands of private parties the power to bar the establishment or relocation of a competitor by obtaining, as a ministerial matter and prior to any notice or hearing, a Section 3062 injunction. It is this prehearing "veto" that demands invalidation under the Supremacy Clause.

Overall, then, it is clear that while defendants have expended considerable effort in explicating and arguing a number of facts and "issues" which might be pertinent to some other lawsuit, those issues are totally irrelevant to the questions raised by the present motion. The instant Motion turns solely on an application of constitutional laws to undisputed facts and should not be avoided by allusion to extraneous, irrelevant facts and false issues.

III. DUE PROCESS REQUIRES NOTICE AND THE OPPORTUNITY TO BE HEARD

A. *The Board's Prohibitory Injunction, Irrespective of the Label Used to Describe It, Cannot Constitutionally Issue Without Notice and the Opportunity to Be Heard*

In support of their contention that the Board's prohibitory order is not unconstitutional, defendants

advance the proposition that because the Act commands the Board automatically to issue its order without the exercise of any discretion, it has been "erroneously label(ed)" as an "injunction" when in fact said order is no more than a letter of "notification." (See Defendants' Memo. pp. 44-45.) Thus, defendants conclude, when this order is "recognized for what it is," plaintiffs' Motion must fail as a matter of law (Defendants' Memo. p. 44, lines 21-25).*

How an argument stressing the automatic and mindless nature of the prohibition commanded by the statute constitutes a defense to the due process issue now before the Court is mystifying. Plaintiffs are not challenging a discretionary act or a peculiar application of the Board's injunctive order in any particular case, but rather the statute itself which mandates that such an order issue absent review, notice or hearing in *every* case where a request is made by a protesting dealer.

Indeed, the automatic nature of the injunction required by Vehicle Code § 3062, rather than constituting a defense, is the most egregious constitutional

*The Board's letter of prohibition, a representative example of which is attached as Exhibit "D" to plaintiffs' Complaint herein, speaks for itself. The first two sentences of that letter state:

> "You are hereby notified that Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. *Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing* as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership." (Emphasis added.)

It is respectfully submitted that the Court, upon reading this letter, can readily recognize it "for what it is."

defect of the Act. It is this provision which delivers the full force and majesty of the State into the hands of private automobile dealers located in a statutory 10-mile "relevant market area." It is Section 3062 that creates the evil of a prohibitory order being issued not because the State upon notice and hearing has made an independent and unbiased determination that the intrusion of its power is necessary under the particular circumstances of a given case, but because a private citizen writes a letter stating "I protest."

There can be no doubt that such a scheme violates the fundamental principles of due process in the exact same manner as the statutes struck down in *Fuentes v. Shevin, supra.* The comparison between the challenged provisions of the Act and the replevin procedures held to be constitutionally defective in *Fuentes* is striking and inescapable.

In *Fuentes*, the Court described the Florida replevin statute thusly:

> "Under the Florida statute . . . [t]here is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.' Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond . . . On the basis of the complaint and bond, a writ is issued 'command[ing] the officer to whom it

> may be directed to replevy the goods and chattels in possession of defendant . . . and to summon the defendant to answer the complaint.' . . . Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing. . . ." 407 U.S. 67 at 73-75 (1971) (Emphasis by the Court).

The Court observed that while the Pennsylvania statute was not materially different, it did not even require that the plaintiff formally allege that he was lawfully entitled to the property to be seized. *Id.* at 77-78. Thus, to the extent any differences may be perceived in the procedures struck down in *Fuentes* and the procedures in the Act, these are differences which make the present attack on the Act even more compelling. This is so because the statutes in *Fuentes* at least required a bond, and, in the case of the Florida statute, a statement under oath and a formal complaint before the deprivation could take place. None of these "safeguards" can be found in the instant case.*

Plaintiffs do not contend that the Constitution mandates a full evidentiary hearing prior to the de-

*Even if such "safeguards" were present in this case, the Act would still be unconstitutional: ". . . [T]hose requirements are hardly a substitute for a prior hearing for they test no more than the strength of the applicant's belief in his own rights." *Fuentes v. Shevin, supra* at 83.

privation.* The elasticity of due process cannot, however, except in the most extraordinary of circumstances, be stretched so far as to permit a deprivation without any hearing at all:

> ". . . [T]he Court has traditionally insisted that, *whatever its form*, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Fuentes v. Shevin, supra* at 82. (Emphasis added.)

See also *Bell v. Burson*, 402 U.S. 535, 542 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1970); *Goldberg v. Kelly, supra;* and *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

On pages 47 to 49 of their Memorandum in Opposition, defendants suggest that, even if the Act results in deprivation of a substantial interest, the requirement of prior notice and a hearing as set forth in *Sniadach v. Family Finance Corp., Boddie v. Connecticut,* and *Fuentes v. Shevin, supra,* is not applicable herein. Two reasons are advanced in support of this proposition:

First, defendants suggest that the principles enunciated in *Sniadach, Boddie* and *Fuentes, supra,* deal only with deprivations of specialized types of property such as wages and household goods, and are therefore inapposite to the present case. (Defendants' Memo. pp. 42-49); and

*The concept of due process is sufficiently flexible to permit variance in the *form* of a hearing. *See, Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

Second, defendants claim that because there is no permanent deprivation unless and until the Board finally determines against the proposed enfranchisement or relocation of a dealer, due process is satisfied so long as there is a hearing before the Board's final order becomes effective. (Defendants' Memo. p. 49).

Defendants' first argument was likewise made in *Fuentes* and was categorically rejected by the Supreme Court: "In none of these cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests." *Fuentes v. Shevin, supra* at 89. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1970) (right not to have reputation impaired). In addition, it is undisputed that the primary means whereby Messrs. Fox and Muller (as well as their employees) earn their respective livelihoods is through the operation of their dealerships. As to these individuals, the rights at stake are (although the monetary impact is greater) indeed synonymous with the wages deemed to be important interests in *Sniadach, supra* at 340, not to mention the kitchen stove and household goods involved in *Fuentes, supra* at 70-71. Similarly, General Motors and its thousands of employees are directly affected by the deprivation.

Moreover, the right to engage in a lawful business has long been afforded the same constitutional protection granted other fundamental rights. See, *Meyer v. Nebraska*, 262 U.S. 390 (1923). Defendants' attempt to avoid this protective penumbra by suggesting that the threatened interest, because it involves a business, is a "property" right which is somehow different than other constitutionally protected liberties. To the extent that defendants cite and quote *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) (Defendants' Memo. p. 47, lines 1-9) in support of this particular proposition, they are relying on a distinction that the Supreme Court has expressly rejected:

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

Defendants' second argument to the effect that due process is forgiving of temporary deprivations so long as there is a hearing prior to a permanent deprivation finds no support in the case law.* Indeed,

*On page 45 of their Memorandum, defendants raise the same temporal distinction to support the contention that the Board's initial prohibition is not really an "injunction" because it is not a permanent order. This argument overlooks the fact that injunctions may be either preliminary or permanent in nature and that, in either case, due process requires notice and a hearing before issuance of the order.

the Supreme Court, in *Fuentes v. Shevin, supra* at 86, has expressly rejected this notion:

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. *While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing,* it is not decisive of the basic right to a prior hearing of some kind.*"

It made no difference to the Court in *Fuentes* that a later hearing might vindicate the rights of the deprived party or that the required bond (absent in this case) might provide a vehicle for money damages:

> "But no later hearing and no damage award can undo the fact that the arbitrary taking that

*While the duration of the Board's injunction is irrelevant to the constitutional issue presented herein, it is interesting to note defendants' attempt to minimize the initial prohibition by characterizing it as a mere delay or inconvenience (Defendants Memo. p. 45, line 12; p. 50, line 1). Despite this characterization, it is clear that the Board's prohibition may remain in effect for a considerable period and while in effect has a dramatic impact upon the parties who are affected by the prohibition.

Pursuant to the Board's regulations, and as described in defendants' Memorandum (page 12, lines 19-26), *at some time* "subsequent to issuance" of the prohibition on establishment or relocation, the Board must order a hearing to be held. Although the hearing date must be within sixty days of the date the Board sends the order for a hearing, the missing ingredient is the time elapsed between the initial injunction and the "subsequent" order setting a hearing date. Moreover, where the matter is heard by a hearing officer, even if the franchisor prevails and the hearing officer finds the protest devoid of merit, the injunction remains in effect until such time as the Board finally acts. *Throughout this entire period— and even if the hearing officer finds a particular protest totally devoid of merit—the injunction remains in effect.*

> was subject to procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Id.* at 82, quoting *Stanley v. Illinois*, 405 U.S. 645, 647.

Defendants' reliance on *Opp Cotton Mills v. Administrator of Wage & Hour Division*, 312 U.S. 126, 152 (1941), for the purpose of distinguishing hearing requirements with respect to temporary and final orders is misplaced. The due process question in that case arose out of proceedings by an industry committee formed by the Administrator of the Wage and Hour Division of the Labor Department to investigate industry conditions and to make recommendations to the Administrator with respect to minimum wages. After conducting an investigation and considering the information gathered, the committee made its recommendations to the Administrator; that official thereupon gave notice, conducted hearings, made findings and issued a final order. Not until this final order was made was there any effect on petitioner's business.

Petitioner Opp Cotton Mills challenged the Administrator's order on the grounds that the investigating committee did not conduct a formal proceeding upon notice and a hearing. In rejecting this challenge, the Supreme Court drew a careful distinction between the due process requirements imposed on a committee which could only *recommend* action and the administrative agency which had the power to *take* action.

> "It is clear that the sections of the statute now before us do not require the committee to conduct a quasi-judicial proceeding upon notice and hearing. *Its function, as already stated, is to investigate upon the basis of data which the Administrator may submit and which the committee may procure for itself and to report its recommendation with respect to the minimum wage.*" 312 U.S. 126, 152. (Emphasis added.)

In that same paragraph, and again on the next page of its opinion, the Court pointed out that before anyone could be actually affected by administrative action, it was necessary to satisfy a far more stringent standard of due process. Thus, a minimum wage rate could not be put into effect ". . . by administrative action which has not been found to be in accordance with law by an independent, responsible administrative office of the Government, exercising an independent judgment on the evidence *after a legal hearing.*" 312 U.S. 152 (Emphasis added).

The Court went on to note that there had indeed been notice and a hearing prior to implementation of the wage order:

> "Notice of the hearing before the Administrator was given in conformity to the statute, and since the notice was forty days in advance of the time when petitioner's representative was heard and introduced evidence into the record and a further opportunity was given to present evidence, the contention that the notice to petitioner was inadequate or failed to meet constitutional requirements is without merit." *Id.* at 153.

Thus, it can be seen that, on the facts of *Opp Cotton Mills*, notice and a hearing were provided *prior* to the time petitioners were actually affected.

Although defendants cite *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950) *reh. denied*, 340 U.S. 857, to support the notion that due process is satisfied by a hearing at "some stage" (Defendants' Memo, p. 47, line 6), the careful procedures followed by the government in that case stand in stark contrast to the procedures under the Act. Moreover, as has been noted in plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (pp. 22-25), *Ewing* is totally inapposite because it represents the kind of extraordinary situation (misbranded drugs) which *Sniadach, supra* held may permit summary seizure. Despite the extraordinary nature of the circumstances, the procedures followed in *Ewing*, unlike the Act, at least required two levels of independent governmental scrutiny prior to effecting the deprivation. The first such level of scrutiny was by the Food & Drug Administrator who made an independent finding of probable cause to justify the seizure. That finding was then subject to review by the Attorney General of the United States. Under the Automobile Franchise Act, there is no requirement for a finding of good cause and the deprivation occurs absent any review or approval by any responsible government official.

B. *There Are No "Extraordinary Circumstances" Present in Establishment or Relocation Cases Sufficient to Justify Deprivation Prior to Notice and Hearing*

As the decisions discussed above repeatedly emphasize, any exemption from the notice and hearing requirement of the Due Process Clause is, and must continue to be, closely confined. Pre-hearing deprivations, whatever their duration, must arise in the context of "*extraordinary situations* where some valid governmental interest [is] at stake that justifies postponing the hearing until after the event," *Boddie v. Connecticut, supra* at 379. (Emphasis added.) The test for these "extraordinary situations" and the procedures that must be followed were enunciated by the Supreme Court in *Fuentes,* supra, at 91:

> "First, in each case [where seizure was permitted] the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."

There can be no doubt that the establishment and relocation provisions of the Act are in blatant violation of the requirement that the State maintain strict control over its monopoly of legitimate force by assuring that the person initiating the deprivation is a

government official responsible for determining what is necessary and justified in the particular instance. The Automobile Franchise Act, as is repeatedly revealed in defendants' own Memorandum, freely delivers the monopoly of force into the hands of protesting dealers. Indeed, defendants acknowledge that the Board has no control over the issuance of its prohibitory orders; such orders *must* issue upon the filing of a protest. (Defendants' Memo. pp. 44-45). Pursuant to the Act, the *only* persons who may invoke the injunctive power of the Board, and hence effectuate the deprivation, are existing automobile dealers who wish to enjoin the establishment or movement of an existing or potential competitor. Because the Board has no power to deny, and indeed must always grant a request for a prohibitory order, it is clear that the State has delegated its monopoly of legitimate force to private persons who utilize that force to their own advantage.

Similarly, there has been no demonstration—nor do defendants anywhere allege—that there is a "special need" for a prehearing deprivation in establishment or relocation cases. As noted in *Fuentes, supra* at 91-92, a "special need" arises *only when life, health or the very fabric of our society are threatened* (*i.e.*, protection of the public from contaminated food, from bank failures, from misbranded drugs, or to aid in the collection of taxes, or the war effort. 407 U.S. at 91-92). Certainly, such dire exigencies are not threatened by the proposal that the already licensed Muller dealership be moved from its present

antiquated and dilapidated facility to a newer facility some 2.2 miles away. Nor can there be "special need" to prohibit Fox, which is and has been for many years a licensed automobile dealership, from selling Buicks in addition to its other line-makes. Yet, the same form of summary deprivation utilized to protect the public from contaminated food is being employed to prevent the relocation of Muller and the inception of Buick sales by Fox.

Finally, it is clear that the relocation and establishment provisions of the Act cannot rise to the level of compelling public necessity present when the State charters a bank (public trust and prevention of fraud),* approves an airport site (public safety),** or issues a liquor license (control of a dangerous substance).*** There can be no equation between

*California banking legislation has resulted from ". . . years of observation of the intimate relation of banking with the business world, the disastrous consequences of unsound banking and the necessity for prompt measures for the protection of the public therefrom. It is generally recognized, as it is clearly obvious, that it is the duty of the state to its people who are dealing with banking institutions of a *quasi* public nature to see that protection to the public is afforded by the immediate abatement of such institutions as have become unsafe or insolvent and whose further continuance in business is a fraud upon and a menace to the public, and that danger can only be effectually averted by prompt action on the part of the state." *State Savings and Commercial Bank v. Anderson,* 165 Cal. 437 (1913); *aff'd per curiam,* 238 U.S. 611.

**Section 21666 of the California Public Utility Code makes it clear that safety is a fundamental requiremtn (sic) for the approval of airport sites.

***Alcoholic beverage licensing has long been predicated on the notion of controlling a dangerous substance. See, *Crowley v. Christensen,* 137 U.S. 86 (1889). See also, California Stat. 1953, Ch. 152, § 23001, p. 955, wherein the Legislature declares the control of alcoholic beverages to involve the well being and

actions to prevent fraud, control dangerous substances and insure physical safety in connection with airplanes, and the Board's prehearing injunction which bars Fox and Muller, who have already satisfied the State's test to insure their qualifications as automobile dealers, from selling Buicks or moving to a new facility 2.2 miles down the road.

It is respectfully submitted the Act's provisions for prehearing deprivations are in contravention of every constitutional test for due process enunciated by the Supreme Court and accordingly should not be allowed to endure.

IV. THE ESTABLISHMENT AND RELOCATION PROVISIONS OF THE ACT ARE INCONSISTENT WITH THE ECONOMIC POLICIES REFLECTED IN THE ANTITRUST LAWS OF THE UNITED STATES AND MUST THEREFORE BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE

Defendants' arguments concerning the antitrust ramifications of the Act, although lengthy, simply serve to confuse the issues before the Court on the instant motion. With respect to plaintiff's antitrust claim, only two basic questions need be answered:

(1) Do the establishment and relocation provisions of the Act result in a restraint on trade

safety of the State and its people "in the highest degree." Moreover, the States are afforded a great deal of latitude in this area by the Twenty-First Amendment to the United States Constitution.

inconsistent with and contrary to the mandate of the Sherman Act? and

(2) If so, are those provisions invalid under the Supremacy Clause?

In addressing these issues, it should be remembered that the antitrust claim advanced by the present Motion focuses solely on the provisions of the Act which permit existing automobile dealers automatically to bar the establishment of a new competitor or the relocation of an existing competitor simply by writing a letter of protest. Any antitrust ramifications that may flow from the Board's ultimate determination on the protest following notice and hearing are not now before the Court.

A. *The Establishment and Relocation Provisions of the Act Clearly Result in a Restraint on Trade Inconsistent with and Contrary to the Mandate of the Sherman Act*

It is well established, and defendants do not argue to the contrary, that horizontally imposed territorial restraints and market allocations constitute *per se* violations of the Sherman Act. *United States v. Topco*, 405 U.S. 596 (1972); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *American Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).

Despite defendants' contortious attempt to show the contrary, it is impossible legitimately to conclude that the restraints imposed by existing dealers ob-

taining automatic injunctions against the establishment and relocation of their present and potential competitors are imposed other than horizontally. Although the Board provides the mechanism of restraint, it is the existing dealers and *only* the existing dealers who have the power to invoke the automatic injunction. Simply put, absent a letter of protest, there is no automatic injunction and there is no restraint. The question in determining whether the restraint is imposed vertically or horizontally depends not upon an analysis of who commits the last act to effect the restraint but rather upon an analysis of who has the power to initiate and control the act. See *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *American Motor Inns, supra.*

Because the Board is devoid of any power to prevent the automatic injunction from issuing once a letter of protest is received, it is patently apparent that only those existing dealers who are at the same level of the market structure as the proposed new dealer and the dealer who decides to relocate, have the sole and unfettered power to initiate and control the injunctive restraint on competition.

Despite defendants' eight-page effort to dismiss the effect of *American Motor Inns, supra,* the facts of that case and the legal principles enunciated therein are simply not distinguishable from the instant case:

> "In the present case the district court found that [defendant] treated 'as a veto' the objections by its existing franchisees to [plaintiff's] application for a license at the Elizabeth location . . .

"By *thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the . . . market,* [*defendant*] *enabled its franchisees already in the . . . area to divide that market between themselves,* thus precluding further intrabrand competition. *Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act." American Motor Inns, supra* at 1242.

Moreover, when the Attorney General of the State of California was first constrained to comment upon the antitrust ramifications of the Act, he stated in a letter directed to a member of the California Assembly* that:

"Assembly Bill 225, [*the Act*]*, which has been reviewed by our legal staff, has an apparent anticompetitive effect upon the new car market.* Specifically, the bill requires an automobile manufacturer to notify each dealer in the same line-make in a given metropolitan area or community of its intent to establish or relocate an additional dealership in that area. Any single dealer may then file a protest with the New Motor Vehicle Board, which determines whether good cause for an additional dealership exists. The manufacturer has the burden of proof to establish good cause before the Board. In connection with this, he must establish that additional competition is required in the market area.

"The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition.

*Letter of August 3, 1973 from Evelle Younger, Attorney General of the State of California to Assemblyman Gonsalves. A copy of said letter is attached hereto as Exhibit A.

The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.

"Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963). Likewise, territorial restrictions imposed by the manufacturer on dealers are *per se* violations. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967)." (Emphasis added.)

It is respectfully submitted that the analysis of the Attorney General of the State of California in a non-litigation context is far more persuasive than the advocate analysis contained in defendants' Memorandum in Opposition to the Motion for Partial Summary Judgment.

Defendants' final effort to demonstrate that the relocation and establishment provisions of the Act are not blatantly anticompetitive is demonstrative of the futility of their position. At page 27 of their Memorandum, defendants state ". . . plaintiffs have proved neither the purpose of protesting franchisees to prevent competition, nor the existence of anticompetitive effect resulting from franchisee action." (Defendants' Memo. p. 27, lines 10-13). But the motives of the parties to a *per se* violation of the Sherman Act are irrelevant, and the anticompetitive effect of the violation is conclusively presumed. Moreover, the affidavits prove that plaintiff Fox has been totally barred from competing in the sale of Buicks

for 16 months *solely* as a result of an automatic injunction obtained by his would-be competitors and plaintiff Muller has for many months been precluded from relocating his business by his existing competitors. What more the defendants would require in the way of anticompetitive impact defies understanding.

Because the establishment and relocation provisions of the Act and the procedure for an automatic injunction which is an integral part thereof give rise to a *per se* violation of the Sherman Act, they must be found to result in a restraint on trade inconsistent with and contrary to the mandate of the Sherman Act.

B. *The Establishment and Relocation Provisions of the Act Are Invalid Under the Supremacy Clause*

Defendants argue that even if the anticompetitive scheme effectuated by the establishment and relocation provisions of the Act is inconsistent with and contrary to the national economic policy espoused in the Sherman Act, "[t]he acts of defendants undertaken pursuant to and in effectuation of the terms of the California Automobile Franchise Act do not violate the prohibitions of the Sherman Act." (Defendants' Memo, p. 32, lines 5-9). This argument misses the mark. The issue is not whether the anti-competitive acts of government officials are insulated from liability under the Sherman Act, but whether the *Act itself* is in conflict with federal law and therefore must give way under the Supremacy Clause.

The issue in this case is precisely the same issue that was decided by the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). In *Schwegmann*, the State of Louisiana had enacted a law which permitted resale price maintenance agreements between distributors and retailers. In addition, the Louisiana statute provided that once any distributor and a single retailer had entered into such an agreement, any other retailer of the same commodity who had not entered into such an agreement but who sold or advertised the commodity at a price less than that specified in the agreement would be guilty of unfair competition and subject to suit.

Speaking for the majority, Justice Douglas observed that "[f]ixing minimum prices, like other types of price fixing, is illegal *per se*" and that "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval of Congress." *Schwegmann, supra* at 386. Justice Douglas made it quite clear that absent a specific exemption from Congress, all aspects of the resale price maintenance scheme, both voluntary and involuntary, would be invalid under the Sherman Act, whether authorized by state statute or not.

> "It is clear from our decisions under the Sherman Act (26 Stat. 209) that the inter state marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it." *Ibid.*

However, in 1937 Congress had enacted the Miller-Tydings Act as an amendment to Section 1 of the Sherman Act. That amendment exempted from the

Sherman Act resale price maintenance agreements voluntarily entered into pursuant to state law, but did not extend the exemption to cover the enforcement of such agreements against those who had not signed a similar agreement. The Court thus concluded that only that portion of the Louisiana statute which permitted the enforcement of voluntary resale price maintenance agreements among the parties to such agreements escaped the preemptive power of the Sherman Act:

> "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts and agreement,' the inference is strong that Congress left the noncontracting group to be governed by preexisting law." *Schwegmann, supra* at 395

It should be noted that at the time of the Miller-Tydings amendment to the Sherman Act, several states, including California, had statutes authorizing resale price maintenance agreements. Had congress thought that such statutes were not preempted by the Sherman Act, there would have been no need to enact the Miller-Tydings amendment. As Justice Blackmun stated in *Cantor v. The Detroit Edison Company*, ... U.S. ....., 44 L.W. 5357, 5365-66 (July 6, 1976):

> "Congress itself has given support to the view that inconsistent state laws are pre-empted by the Sherman Act. Were it the case that state statutes held complete sway, Congress would not have found it necessary in 1937 to pass the Miller-Tydings Amendment. . . ."

Thus, *Schwegmann* stands for the proposition that, absent an express congressional intent to the contrary, state laws which conflict with the Sherman Act are invalid under the Supremacy Clause and are unenforceable.

Indeed, as evidenced in the 1975 repeal of the Miller-Tydings and McGuire Act amendments to the Sherman Act, Congress itself has expressly recognized that state fair trade laws, absent Congressional exemption, must give way to the Sherman Act, and so stated in Senate Report No. 94-466, 94th Cong. 1st Sess. (1975). After pointing out that fair trade laws ". . . are, in fact, legalized price fixing," the Senate Report states:

> "Fair trade laws permit a manufacturer to enter into an agreement with a retailer setting the minimum or stipulated price at which his product may be sold. California passed the first State law in 1931 and other States followed. *It became apparent, however, that any state law which applied to interstate commerce violated Federal antitrust laws.* Thus, in 1937, Congress passed the Miller Tydings Act granting State fair trade laws an exemption from the Sherman Antitrust Act." (Emphasis added.)

The above language leaves no room for doubt as to the Congressional intent that state laws inconsistent with the Sherman Act are subject to preemption.

In the present case, it has already been demonstrated that the challenged provisions of the Act result in a *per se* violation of the Sherman Act* just as the resale price maintenance agreements did in *Schwegmann*. There, the Louisiana statute permitted private parties to implement the illegal restraint through the state courts; in the present case the California statute permits private parties to implement the restraint through the device of an automatic injunction obtained from the Board. But, in the present case there is no evidence of any intent on the part of Congress to exempt horizontal territorial and market allocations among franchised new car dealers from the purview of the Sherman act, pursuant to state statute or otherwise. In fact, as is conclusively shown by the "Dealers' Day in Court Act," 15 U.S.C. §§ 1221-1225, the contrary is true.

The Dealers' Day in Court Act provides for federal regulation of the franchising of new car deales (sic) by manufacturers. This act, which was expressly designed by Congress as an adjunct to the Sherman Act** specifically provides in Section 1224 that:

> "No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any

*See Part V.A. of this Memorandum, *supra*.

**See, *Schnable v. Volkswagen of America, Inc.*, 185 F. Supp. 182 (D. Iowa 1960).

> provision of the antitrust laws of the United States."

Moreover, in the House Report accompanying that legislation, Congress expressly stated that *any curtailment* of the right to appoint added dealers in an area is inconsistent with the antitrust objective of the statute. H.R. Rep. No. 2850 84th Cong., 1st Sess. (1956). Thus, to the extent any specific legislative expression is required to demonstrate that Congress did not intend to immunize state laws which permit and encourage *per se* violations of the antitrust laws from the preemptive effect of the Sherman Act, the Dealers' Day in Court Act provides that expression.

The recent decision in *Cantor v. Detroit Edison Company, supra* confirms the applicability of *Schwegmann* to the instant case. In *Cantor*, Justice Stevens, speaking for the plurality, expressly rejected the notion that where state law is inconsistent with the federal antitrust law "the federal interest must inevitably be subordinated to the State's." 44 L.W. at 5362. However, because the plurality concluded that the Michigan regulatory scheme did not conflict with federal antitrust policy it found it unnecessary to address the preemption question. 44 L.W. at 5363.

Justice Blackmun, however, found the principal question in *Cantor* to be "the Sherman Act's preemptive effect upon inconsistent state laws" and "one of Congressional intent." Id. at 5365. Thus, Justice Blackmun's concurring opinion of is the most enlightening on the issue raised in the present case. In

that opinion, the Justice persuasively demonstrates that "the Sherman Act generally preempts inconsistent state laws." 44 L.W. at 5366. Although Justice Blackmun concedes some difficulty in establishing an uncompromising rule by which the courts could determine just which state laws are preempted by the Sherman Act and those which are not, it is respectfully submitted that where the state statute places in the hands of private citizens the power unilaterally to invoke the process of the state to accomplish *per se* violations of the Sherman Act, the state law is so dramatically at odds with the federal policy that the state statute must give way. As the Court said in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); "No State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress." 193 U.S. at 350.

Defendants' reliance on *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), reh. den. 384 U.S. 967, is misplaced. *Seagram* involved a number of constitutional challenges, one of which rested on the Supremacy Clause, to a New York statute requiring distillers to file their monthly price schedules for sales to wholesalers and retailers together with an affirmation that such prices were "no higher than the lowest price" at which sales were made by the distiller or a "related person" anywhere in the United States for the preceding month. 384 U.S. 35, 40 (1965). The term "related person" comprehended

wholesalers doing a substantial part of their business in Seagram brands. Thus, under Section 9 of the New York Act:

> ". . . before a 'related person' wholesaler may sell a particular brand of liquor to a New York retailer, he must secure an affirmation from the brand owner or his agent that the price charged by the wholesaler is no higher than the lowest price at which the brand was sold to any retailer in any other part of the country by any wholesaler doing 'substantial' business with the brand owner. Thus, a brand owner doing business in New York must keep himself informed of the prices charged by all 'related persons' throughout the United States." 384 U.S. 35, at 40-41.

Appellants in *Seagram* contended that this simple reporting provision, and the collection of price information necessitated thereby, was inconsistent with the federal antitrust laws, specifically the Sherman Act, and Section 2 of the Clayton Act as amended by the Robinson Patman Act, 15 U.S.C. § 13. In rejecting this contention, the Court pointed out that:

> "The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act." 384 U.S. 35 at 45.

Thus, the New York statute, standing alone, did not have any anticompetitive effect nor did it purport to permit anticompetitive acts. In order to effect any Sherman Act violation in connection with the Section 9 compilations, private person would have to take

action *beyond the parameters of the statute* by combining or conspiring to misuse the price information. The Court was careful to point out that this second step would not be insulated from the antitrust laws.

In contrast, Vehicle Code § 3062 requires no second step. The anticompetitive injunction is obtained pursuant to the express statutory language which mandates that a prohibitory order issue upon the filing of a protest. Once that order has issued, a *per se* violation of the Sherman Act has occurred; nothing more is required.

Likewise, defendants' reliance on *Parker v. Brown,* 317 U.S. 341 (1942) is misplaced. Although *Parker* has been cited in support of varying positions over the last 35 years, *Cantor, supra* puts *Parker* in its proper perspective. As Justice Stevens points out, *Parker* was solely concerned with the legality of the conduct of state officials charged by law with the responsibility for administering California statute. 44 L.W. at 5363. The distinction between the *Parker* issue and the issue in this case is made apparent by Justice Stevens' statement that "[e]ven if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an invalid program had thereby violated the Sherman Act." 44 L.W. at 5364. Thus the issue of whether a state statute must fall under the Supremacy Clause because it is inconsistent with the Sherman Act and the issue of whether state officials and private citizens acting in accordance with the

state law can be held liable under the Sherman Act for their conduct present distinctly different issues. *Schwegmann, supra* deals with the first issue and that is the issue in this case. *Parker* deals with the second issue and that is *not* the issue in this case.

VI. CONCLUSION

As has been demonstrated in the foregoing discussion, the relocation and establishment provisions of the Act violate the fundamental requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; said provisions also operate in direct contravention of the national economic policy reflected in the antitrust laws and made paramount by the Supremacy Clause. For these reasons, it is respectfully submitted that the Court should declare those provisions of the Automobile Franchise Act unconstitutional and should enjoin their implementation and enforcement.

Dated: August 18, 1976

Respectfully submitted,
Hahn & Hahn
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
Attorney for Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton

By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.

Attorneys for Plaintiff
General Motors Corporation

Of Counsel for Plaintiff
General Motors Corporation:
Frazer F. Hilder, General Counsel

By Robert W. Culver

Exhibit A

Letterhead of
State of California
Office of the Attorney General
Department of Justice
State Building, Los Angeles, 90012

August 3, 1973

Honorable Joe A. Gonsalves
Member of the Assembly
State Capitol
Sacramento, CA 95814

RE: Assembly Bill 225 (as amended June 5, 1973)

Dear Assemblyman Gonsalves:

We are writing to express our concern over those portions of Assembly Bill 225 which would, in part, create an implied exemption for new-car dealers to the Cartwright Act, the State antitrust law.

Assembly Bill 225, which has been reviewed by our legal staff, has an apparent anticompetitive effect upon the new car market. Specifically, the bill requires an automobile manufacturer to notify each dealer in the same line-make in a given metropolitan area or community of its intent to establish or relocate an additional dealership in that area. Any single dealer may then file a protest with the New Motor Vehicle Board, which determines whether good cause

for an additional dealership exists. The manufacturer has the burden of proof to establish good cause before the Board. In connection with this, he must establish that additional competition is required in the market area.

The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.

Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963). Likewise, territorial restrictions imposed by the manufacturer on dealers are *per se* violations. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). Many cases hold that decisions under the Sherman Act are applicable to problems arising under the State Cartwright Act.

In pointing out these problems, we should also make it clear that we are not opposing the very desirable portions of Assembly Bill 225 which provide for safeguards to dealers, and, ultimately, consumers, in the implementation of vehicle warranties.

The anti-competitive aspects of Assembly Bill 225, however, force us to take a position of opposition. The purpose of the Cartwright Act to insure competitive conditions in the public interest would not be served by the bill in its present form.

If we can be of any assistance to you in this matter, please feel free to call on us.

Very truly yours,
/s/ Evelle J. Younger
Evelle J. Younger
Attorney General

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

PLAINTIFFS' REPLY TO INTERVENORS' ANTITRUST AND ABSTENTION ARGUMENTS

Intervenors Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California have submitted memoranda in opposition to plaintiffs' motion for partial summary judgment* and in support of defendant New Motor Vehicle Board's motion to dismiss on the ground of abstention.** Although intervenors' arguments are simplistic, the Court should not find them persuasive. For the most part, plaintiffs' Memorandum in Reply to Defendants' Opposition to the Motion for Partial Summary Judgment (filed August 18, 1976) should suffice to rebut intervenors' arguments. However, certain aspects of the intervenors' memoranda merit separate response.

*Intervenors' Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated August 4, 1976 (hereafter "Intervenors' Antitrust Memo").

**Intervenors' Memorandum in Support of Defendants' Motion To Dismiss, dated August 4, 1976 (hereafter "Intervenors' Abstention Memo").

I. INTERVENORS' AUTHORITIES DO NOT REBUT PLAINTIFFS' CLAIM THAT THE AUTOMOBILE FRANCHISE ACT CONFLICTS WITH THE FEDERAL ANTITRUST LAWS.

A. *Preemption*

Intervenors argue that the Dealers Day in Court Act, 15 U. S. C. §§ 1221-1225 (hereinafter "Dealers Act"), rather than being evidence of specific congressional intent to insure the full application of the Sherman Act to matters involving the interstate franchising of new car dealers by manufacturers, constitutes an unfettered license whereby the states may emasculate the Sherman Act. The sole basis for this argument is Section 1225 of the Dealers Act, which provides that, absent a conflict with one of its provisions, the Act itself does not invalidate state laws.

It is not necessary to go beyond the fact of the statute itself to demonstrate the failure of intervenors' argument. In Section 1224 of the Dealers Act, Congress expressed its intention in absolute terms: *"No provision* of this chapter shall repeal, modify, or supersede, *directly or indirectly,* any provision of the antitrust laws of the United States." Section 1225, upon which intervenors rely, is a provision of the Dealers Act and therefore must be subject to the clear limitations of Section 1224.

Thus it is clear that although Congress intended to preserve the *existing* power of the states to engage in some regulation of the franchise automobile business, it is equally clear that Congress intended to dispel

any notion that the Dealers Act in any way expanded upon that power. Simply put, intervenors' argument that Section 1225 serves as an escape hatch from the preemptive effect of the Sherman Act and the Supremacy Clause fails. At the time the Dealers Act was enacted, that hatch was closed, and in Section 1224 of the Act Congress made clear its intent to keep it closed.

B. *Intervenors' Argument With Respect to "State Action" Addresses the Wrong Issue.*

Intervenors concede "the obvious point that a law creating a state board may be invalidated because the subject matter of the law has been preempted by federal legislation pursuant to the Supremacy Clause." (Intervenors' Antitrust Memo, p. 4.) In so doing, intervenors have unwittingly identified the issue crucial to plaintiffs' antitrust claim: namely, whether the establishment and relocation provisions of the Act and the automatic injunction procedure integral to those provisions, all of which directly conflict with the mandate of the Sherman Act, are invalidated under the Supremacy Clause. Neither intervenors' arguments nor the case which they cite address that fundamental issue.

There was no challenge to a state statute on supremacy grounds or otherwise in *State of New Mexico v. American Petrofina, Inc.,* 501 F.2d 363 (9th Cir. 1974). In that case, Shell Oil Company claimed that New Mexico and some of its political subdivisions had conspired as consumers to fix the price of asphalt and to eliminate competition among themselves in violation of Sections 1 and 2 of the Sherman Act. Thus the sole question presented in *American Petrofina* was whether the state is immunized from antitrust *liability* under the Sherman Act. The court correctly held that the state is immunized from *liability,* but that holding has nothing to do with the question of whether state laws which are in direct conflict with the mandate of the Sherman Act are invalid under the Supremacy Clause.

Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970) *cert. denied,* 400 U. S. 850 (1970), likewise has nothing to do with preemption and the Supremacy Clause. Instead, because the state statute involved in *Whitten* required competitive bidding, the court found the statute affirmatively consistent with the aims of the Sherman Act. 424 F.2d at 31. Thus, the issue in *Whitten* was not whether the state statute was invalid under the Supremacy Clause but whether a private person (Paddock Pools) could be subject to liability under the Sherman Act for engaging in predatory practices and conspiracy to exclude or deter others from the competitive bidding mandated by the state statute. Obviously that is not the issue in the present case.

Cantor v. The Detroit Edison Company, ... U.S. ....., 44 U.S.L.W. 5357 (July 6, 1976) adds nothing to intervenors' position. To the contrary, as has been shown in plaintiffs' Reply to Defendants' Memorandum in Opposition to the Motion for Partial Summary Judgment, *Cantor* affirms the principle that the issue of *liability* under the Sherman Act and the issue

of *invalidity* under the Supremacy Clause of state statutes in conflict with the Sherman Act, are two distinctly unique questions which require equally distinct analysis and determination.

II. THIS COURT SHOULD NOT ABSTAIN FROM DETERMINATION OF PLAINTIFFS' FEDERAL CONSTITUTIONAL CLAIMS.

A. *The Existence of State Civil Litigation Involving Other Issues and Other Parties Does Not Justify Abstention.*

Intervenors argue that this Court should abstain under the doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941) because a California Court of Appeal may, in unidentified existing litigation, declare the Automobile Franchise Act unconstitutional under the Due Process Clause of the California Constitution. (Intervenors' Abstention Memo, pp. 2-3.)

Intervenors appear to refer to *American Motors Sales Corp. v. New Motor Vehicle Board,* a case now on appeal from a decision of the Sacramento County Superior Court. As plaintiffs explained in their Memorandum in Opposition to Defendants' Motion To Dismiss (filed June 8, 1976), that case involves an issue—the validity of the Board's composition—not presented by the motion for partial summary judgment now before this Court. Moreover, none of the plaintiffs in this action are parties to the *American Motors* litigation. To suggest, as intervenors apparently do, that the existence of state litigation involving *other parties* and *other issues* somehow calls for *Pull-*

man-type abstention, is to replace legal argument with wishful thinking.

Plaintiffs' previous memorandum demonstrated that abstention under the *Pullman* doctrine is appropriate only when the challenged state statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman v. Forssenius,* 380 U. S. 528, 534-35 (1965). Abstention is not warranted simply because the Automobile Franchise Act might have been challenged under the state constitution in state court, and intervenors' argument to the contrary is expressly foreclosed by the Supreme Court's recent decision in *Examining Board of Engineers v. Flores de Otero,* ..... U. S. ....., 44 U.S.L.W. 4890 (June 17, 1976). Appellants in that case contended that the federal district court should have abstained from determining the validity of a Puerto Rico professional licensing statute under the United States Constitution because the statute might be invalid under the Puerto Rico Constitution. The Supreme Court disagreed, and held that:

> "[T]he abstention issue seems clearly controlled by *Wisconsin v. Constantineau,* 400 U. S. 433 (1971), where, as it was said in *Harris County,* 420 U. S., at 84-85, n. 8, 'we declined to order abstention where the federal due process claim was not complicated by an unresolved state law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution.'" (44 U.S.L.W. at 4898.)

B. *The Doctrine of Mandatory Abstention Expressed in Younger v. Harris Is Totally Inapplicable to This Case.*

Intervenors argue that the doctrine of mandatory abstention under *Younger v. Harris,* 401 U.S. 37 (1971) must be applied to this case because General Motors and the New Motor Vehicle Board are both parties to state civil litigation in which General Motors' federal constitutional claims could be raised. (Intervenors' Abstention Memo, pp. 4-10). This argument, however, is based upon a fundamental misunderstanding of both *Younger,* its progeny and the pending state civil action to which intervenors refer.

The plaintiff in *Younger* was indicted in state court for violation of California's Criminal Syndicalism Act. He brought suit in federal court for an injunction against the state prosecution, on the ground that the Act was unconstitutional. A three-judge district court agreed and issued an injunction. On appeal, the United States Supreme Court reversed. The Court's holding was based on the principle that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief"; and on the notion of "comity," which requires the federal government "anxious though it may be to vindicate and protect federal rights and federal interest, . . . to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 43-44.

Only this year the Supreme Court has definitely held that *Younger* type abstention applies only to state criminal proceedings, nuisance proceedings antecedent to a criminal prosecution, and proceedings concerning collection of taxes. *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976). The cases utilized by intervenors are either consistent with this holding or totally inapposite.

In *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975), the Supreme Court held that the federal courts should refrain from interfering with a public nuisance action that was antecedent to a criminal prosecution (pornography).* *Duke v. Texas,* 477 F.2d 244 (5th Cir. 1973) and *Lynch v. Snepp,* 472 F.2d 769 (4th Cir. 1973) were both "quasi-criminal" cases very much like *Huffman* in which the federal plaintiffs sought protection from contempt proceedings to enforce injunctions obtained by state officials. Finally, *Cousins v. Wigoda,* 463 F.2d 603 (7th Cir. 1972) was not an attempt to enjoin enforcement of a state statute, but rather an attempt by the defendant in the state action to obtain a federal injunction to interfere with the prosecution against the continuance of the state action which had earlier been removed to federal court and then remanded for lack of jurisdiction. The court of appeals correctly determined that the mere existence

*Although intervenors utilize a quote from the 1972 pocket part of Wright, *Law of Federal Courts* (2d ed. 1970) to suggest that Chief Justice Burger and Justices White and Blackmun are ready to extend *Younger* to all civil cases, they neglect to inform the Court that three years later those same Justices joined in the Court's carefully limited opinion in *Huffman v. Pursue, Ltd., supra.*

of a prayer for relief in the state court proceeding which, if granted, might violate the federal plaintiff's constitutional rights, absent any showing that those rights would not be protected in the state proceeding, did not justify federal injunctive relief.

Intervenors cite "Phillips v. Osborne, 483 Fed. 1074 (9th Cir. 1971)" for the proposition that the Ninth Circuit has extended *Younger* to all civil actions in state courts. However, the case that appears at 483 F.2d 1074 is a 1973 Ninth Circuit decision entitled *Garfinkle v. Wells Fargo Bank,* which has nothing to do with *Younger. Younger* is cited in *Phillips v. Osborne,* 444 F.2d 778 (9th Cir. 1971), but the court's holding in that case was simply that issues presented in pending state litigation were not foreclosed by a prior federal judgment.

In any event, the present situation is quite different from *Younger* and the related cases discussed above. Although General Motors has appeared as real party in interest in the state civil proceeding referred to by petitioners, *Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc. v. New Motor Vehicle Board* (Sacramento County Superior Court. No. 256 856), none of the constitutional issues involved in the present federal action have been raised or decided in that state court case, and there is no reasonable likelihood that they ever will be.

The *Becherer* case is nothing more than a discovery matter which began as a petition by two dealers who have protested the establishment of a Buick-Opel franchise in Pasadena, California for a writ of man-

date compelling the New Motor Vehicle Board to issue subpoenas for certain depositions in advance of the administrative hearing on the protests filed by Becherer and O'Donnell. The Sacramento County Superior Court decided that the New Motor Vehicle Board is totally without power to issue subpoenas for prehearing discovery depositions, and Becherer and O'Donnell have appealed.

Whatever, the final determination may be in that matter, it will turn principally upon an interpretation of various provisions of the California Government Code pertinent to discovery in administrative proceedings. That is an issue totally foreign to the instant case.

C. *There are No Grounds for Dismissal on the Basis of Conserving Judicial Resources*

In arguing that the policy in favor of conserving judicial resources discussed in *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), requires dismissal of the matter now before this Court, intervenors demonstrate a fundamental misunderstanding of the Supreme Court's pronouncements. Intervenors also misstate the facts concerning the participation of General Motors in other state litigation.

As has been repeatedly noted in this memorandum, General Motors is not a party to any other pending state litigation involving the Board except the *Becherer* discovery matter; the irrelevancy of that proceeding to any of the issues now before this Court

has already been demonstrated. Indeed, intervenors, in the portion of their memorandum devoted to a discussion of *Younger v. Harris, supra,* premise their argument on the notion that while General Motors did not bring its federal constitutional claims to a state court, it should have done so. It is therefore surprising to find that intervenors, having extensively discussed the *Becherer* matter on pages 4 and 5 of their memorandum, can then assert on page 12 of that same document that ". . . GM [is] currently participating in state court proceedings in which the *identical issue is being litigated* . . .". (Intervenors Abstention Memo, o. 12, lines 5-6; emphasis added.) This is simply erroneous.

Intervenors' analysis of the teachings of *Colorado River Water Conservation District v. United States, supra,* is equally incorrect. The Court's utilization of the "wise judicial administration" rationale was made possible by the fact that the Court expressly found "no federal constitutional issue for decision." 47 L.Ed. 2d at 496. Because there was no need to consider principles concerning proper constitutional adjudication—principles that command the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" 47 L.Ed.2d at 498—the Court was able to apply different criteria. In so doing, the Court repeatedly made it clear that only the most "exceptional" of circumstances and the "clearest of justification" would warrant a "judicial administration" dismissal. The Court found that exceptional circumstance in the McCarran Amendment, 43 U.S.C.

§666, which the Court held to be a clear expression of a Congressional intent with respect to the proper manner of adjudicating water rights in a river system. It was this "most important" factor that warranted dismissal. 47 L.Ed.2d at 499.

In the matter now before this Court, the clear expression of Congressional intent in 28 U.S.C. §1331 (a), 1337 and 1343(3), compels the conclusion that plaintiffs are entitled to a federal forum for resolution of their federal constitutional claims:

> "Congress [has] imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler v. Koota,* 389 U.S. 241, 248 (1967).

III. CONCLUSION

For all the reasons set forth above, this Court should deny the Motion to Dismiss and should consider and adjudicate the federal constitutional claims presented by plaintiffs' Motion for Partial Summary Judgment.

DATED: August 19, 1976.

Respectfully submitted,
Hahn & Hahn
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
Attorneys for Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton

Of Counsel for Plaintiff
General Motors Corporation
Frazer F. Hilder, General Counsel
By Robert W. Culver

By Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff
General Motors Corporation

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

SUPPLEMENTARY AFFIDAVIT OF JOHN MULLER

State of California
County of Los Angeles—ss.

JOHN MULLER, being duly sworn according to law, deposes and says:

1. I am the President and principal shareholder of Muller Chevrolet, 3701 Oceanview Boulevard, Montrose California, one of the plaintiffs in this matter.

2. As I stated in my Affidavit in Support of the plaintiff's Motion for Partial Summary Judgement in this matter, I realized, soon after acquiring my dealership in October of 1973, that the physical facility at 3701 Oceanview Boulevard was totally inadequate to house an automobile dealership, particularly with respect to providing repair service for the owners of Chevrolet cars and trucks. I thereafter spent more than two years seeking out, and reaching an agreement for the acquisition of, a facility that would accommodate my needs and the needs of the public. Although I found such a facility at 475 Foothill Boulevard in La Canada, some 2.2 miles from my present dealership site, my attempts to relocate there

were blocked when two of my competitors filed protests and the New Motor Vehicle Board issued an order prohibiting the move.

3. Because I was concerned that I could not hold together for an indefinite period my arrangement concerning acquisition of the proposed facility, I asked my attorney Norin Grancell, to take all the steps necessary to expedite the administrative proceedings and to challenge the statutes that permitted my competitiors to obtain a prehearing injunction prohibiting the relocation of my business.

4. The prohibitory order of the New Motor Vehicle Board was dated February 6, 1976. The hearing on the merits of the protests against my relocation did not begin until August 2, 1976. In the more than six month interim, I expended a great deal of time and effort in attempting to maintain my arrangements with Continental Financing Company, the owner of the property to which I intended to relocate my dealership. Representatives of Continental Financing, however, advised me that they could not insure that the facility at 475 Foothill Boulevard would remain available for an indefinite period.

5. On or about August 20, 1976, I was informed by Mr. Grancell that a proposed decision had been rendered by the Administrative Law Judge who had heard the protests concerning my dealership, and that the judge had found good cause existed to permit the relocation. I was futher advised, however, that this decision was not final and that, under the appropriate Vehicle Code sections, the New Motor Vehicle Board

could approve or reject the proposed decision and could even reopen the entire matter. Thus, Mr. Grancell informed me, it would be necessary to wait an additional thirty days before the proposed decision, in the absence of action by the New Motor Vehicle Board, would become final.

6. On or about September 14, 1976, just as the thirty-day waiting period was about to end, I was informed by representatives of Continental Financing Company that the facility at 475 Foothill Boulevard was no longer available for occupancy by my dealership.

7. Because the long struggle in connection with the New Motor Vehicle Board's injunction has caused my business to incur substantial legal expenses, and because the goal to be achieved thereby—i.e., moving to the facility in La Canada—cannot now be attained, I have instructed my attorney not to engage in any further activities that would result in additional legal fees, including an appearance before this Court on Monday, September 20, 1976.

8. However, while I cannot at the present time accept the financial burden of additional legal expenses, the Vehicle Code provisions that would permit a recurrence of the events described herein represent a real and continuing threat for the future. My dealership facility remains in the same antiquated and inadequate condition I described in my Affidavit in Support of the Motion for Partial Summary Judgment in this matter. The roof continues to leak, the lease on my showroom facility will soon expire, and

I am still forced to turn away service customers because the dealership cannot physically accommodate all of the cars and trucks brought in for repair. Thus, I must once again attempt to relocate. If the automatic injunction provisions of the Vehicle Code remain in effect, the same competitiors who blocked my relocation in this instance would retain the power to similarly prevent any future attempt on my part; the only effort that would be necessary would be for those competitiors to simply send a letter of protest to the New Motor Vehicle Board.

/s/ John Muller
John Muller

(Jurat omitted in printing)

(Affidavit of Service omitted in printing)

Supreme Court of the United States

No. A-451

New Motor Vehicle Board of
the State of California,
Appellant,

vs.

Orwin W. Fox Co., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the injunction entered October 19, 1977 by the United States District Court for the Central District of California, case No. CV 76-1200 be, and the same is hereby, stayed pending the timely filing and final disposition of an appeal in the above-entitled case in this Court.

IT IS FURTHER ORDERED that pending determination of said appeal, all orders required by California Vehicle Code section 3066, subdivision (a), fixing the times and places of hearings upon protests against relocation or establishment of dealerships shall be issued and served by appellant New Motor Vehicle Board concurrently with the notification

required to be made by the Board to the franchisor under the California Vehicle Code section 2062.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 6
day of December, 1977

A true copy Michael Rodak, Jr.
Tort:

Clerk of the Supreme Court of the United States
By Francis J. Cotton
Deputy

Supreme Court, U. S.
FILED
JAN 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al., *Appellants,*

v.

ORRIN W. FOX CO., et al., *Appellees.*

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al., *Appellants,*

v.

ORRIN W. FOX CO., et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

GIRARD E. BOUDREAU, JR.
JOHN G. NILES
ROBERT C. VANDERET
611 West Sixth Street
Los Angeles, California 90017
Attorneys for Appellee
General Motors Corporation

GEORGE R. BAFFA
301 East Colorado Blvd.
Pasadena, California 91101
Attorney for Appellee
Orrin W. Fox Co.

NORIN T. GRANCELL
611 South Shatto Place
Los Angeles, California 90005
Attorney for Appellee
Muller Chevrolet

Of Counsel:
O'MELVENY & MYERS
HAHN & HAHN
NORIN T. GRANCELL
A Professional Corporation
OTIS M. SMITH
General Counsel
ROBERT W. CULVER
General Motors Corporation
3044 West Grand Blvd.
Detroit, Michigan 48202

INDEX

	Page
MOTION	1
STATEMENT OF THE CASE	2
1. The Challenged Portions of the State Statute	3
2. The Factual Setting: Impact Upon Appellees and Others Similarly Situated	5
3. Proceedings Below	6
QUESTIONS PRESENTED	9
ARGUMENT	11
I. THE THREE-JUDGE COURT'S RULING THAT THE CHALLENGED PORTIONS OF THE ACT ARE IN GROSS VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS MANIFESTLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED	12
A. The Statutory Procedures Which Permit Private Automobile Dealers Arbitrarily To Restrain Competitors From Establishing or Relocating Dealerships in "Their" Relevant Market Areas Without Affording the Affected Parties Any Prior Opportunity To Be Heard and Without Any Prior Review by a Public Entity Clearly Violate Due Process Guarantees	12
B. The Affected Interests of Appellees are Protected Under the Fourteenth Amendment	16

Page

II. THE DISTRICT COURT WAS NOT REQUIRED TO ABSTAIN FROM ADJUDICATING THE FEDERAL CONSTITUTIONAL ISSUES POSED BY THE STATE STATUTE, WHERE THE COURT FOUND THAT THE STATE ACT WAS UNAMBIGUOUS AND THAT NO STATE LITIGATION WAS PENDING WHICH MIGHT RESOLVE OR ELIMINATE THE FEDERAL ISSUES PRESENTED, AND WHERE THERE WERE NO UNCERTAIN STATE LAW ISSUES WHICH COULD POTENTIALLY HARMONIZE THE ACT WITH FEDERAL CONSTITUTIONAL REQUIREMENTS 20

III. THE JUDGMENT OF THE COURT BELOW SHOULD BE SUMMARILY AFFIRMED ON THE ALTERNATIVE GROUND THAT THE CHALLENGED PORTIONS OF THE ACT SQUARELY CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE INVALID UNDER THE SUPREMACY CLAUSE 25

CONCLUSION 32

CITATIONS

Cases

Page

American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975) 26

Arnett v. Kennedy, 416 U.S. 134 (1974) 11, 18

Bell v. Burson, 402 U.S. 535 (1971) 12

Bellotti v. Baird, 428 U.S. 132 (1976) 20, 21

Bishop v. Wood, 426 U.S. 341 (1976) 11

Board of Regents v. Roth, 408 U.S. 564 (1972) 11, 16, 17

Boddie v. Connecticut, 401 U.S. 371 (1971) 12

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 30, 31

Endler v. Schutzbank, 68 Cal.2d 162, 436 P.2d 297 (1968) 22, 23

Feinberg v. Federal Deposit Insurance Corp., 522 F.2d 1335 (D.C. Cir. 1975) 17

Fuentes v. Shevin, 407 U.S. 67 (1972) ..... 11 *et seq.*

General GMC Trucks, Inc. v. General Motors Corp., 329 Ga. 373, 237 S.E.2d 194, *cert. denied*, 46 U.S.L.W. 3389 (1977) 10, 11

Goldberg v. Kelly, 397 U.S. 254 (1970) 20

Goss v. Lopez, 419 U.S. 565 (1975) 11, 15

Harman v. Forssenius, 380 U.S. 528 (1965) 21

Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975) 20, 21, 22

Page

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) 28

Ingraham v. Wright, 430 U.S. 651 (1977) 11, 17

Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966) 26

Keker v. Procunier, 398 F.Supp. 756 (E.D. Cal. 1975) 17

Langnes v. Green, 282 U.S. 531 (1931) 12

Larkin v. Bruce, 352 F.Supp. 1076 (E.D. Wisc. 1972) 17

Logan v. United States, 144 U.S. 263 (1892) 18

Mathews v. Eldridge, 424 U.S. 319 (1976) 15

Meyer v. Nebraska, 262 U.S. 390 (1923) 16, 17

Minnesota v. Northern States Power Co., 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971) .. 11

Morrissey v. Brewer, 408 U.S. 471 (1972) 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12

Northern Securities Co. v. United States, 193 U.S. 197 (1904) 30, 31

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 24

Parker v. Brown, 317 U.S. 341 (1943) 28, 29

Paul v. Davis, 424 U.S. 693 (1976) 11, 18

Perez v. Campbell, 402 U.S. 637 (1971) 28

Perry v. Sindermann, 408 U.S. 593 (1972) 11, 20

Page

Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd., 30 Cal.App.3d 494, 106 Cal.Rptr. 340 (1973) 20

Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13 (1971) 16

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 30, 31

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 12

United States v. Topco Associates, 405 U.S. 596 (1972) 25

White Motor Co. v. United States, 372 U.S. 253 (1963) 25, 27

Wolff v. McDonnell, 418 U.S. 539 (1974) 11

United States Constitution

Commerce Clause, Art. I, § 8, cl. 3 ..... 7, 10

Fourteenth Amendment ..... *passim*

Supremacy Clause, Art. VI, cl. 2 ..... *passim*

Federal Statutes

	Page
Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225	29
Miller-Tydings Fair Trade Act, 15 U.S.C. § 1 *proviso*	30, 31
Sherman Antitrust Act, 15 U.S.C. §§ 1 et seq.	25 *et seq.*
28 U.S.C. § 2281	7
28 U.S.C. § 2284	7

Congressional Materials

Committee Reports

H. R. Rep. No. 2850, 84th Cong., 1st Sess. (1956)	29
S. Rep. No. 94-466, 94th Cong., 1st Sess. (1975)	31

State Statutes

California Automobile Franchise Act, California Vehicle Code §§ 3060-3069	*passim*
California Government Code § 11517(b)	4
California Vehicle Code § 507	3
California Vehicle Code § 11705(a)(10)	4
California Vehicle Code § 11712(a)	19
California Vehicle Code § 11713.2(*l*)	4
California Vehicle Code § 40000.11	4

IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al.,

Appellants,

v.

ORRIN W. FOX CO., et al.,

Appellees.

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al.,

Appellants,

v.

ORRIN W. FOX CO., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Appellees General Motors Corporation, Orrin W. Fox Co. and Muller Chevrolet hereby move, pursuant to Supreme Court Rule 16, that the judgment of the United States District Court for the Central District of California be summarily affirmed on the grounds that the decision below is manifestly correct and in accord with the decisions of this Court and of the lower federal courts, that the questions sought to be presented by these appeals are so insubstantial as not to require further briefing or argument, and that summary affirmance of the judgment is called for in any event on alternative grounds not reached by the court below.

STATEMENT OF THE CASE

At issue in this case is the constitutionality of those portions of the California Automobile Franchise Act ("the Act") (California Vehicle Code §§ 3060-3069, appended as Exhibit H to State Appellants' Jurisdictional Statement)[1] which relate to the establishment and relocation of automobile dealerships. The challenged statutory provisions place in the hands of existing private automobile dealers the arbitrary and unfettered power to restrain potential competitors from establishing or relocating dealerships in "their" relevant market areas for months before any state adjudication — without requiring any showing of probable success, without affording the affected parties any opportunity to be heard, and without any review or determination by any public official or entity. The primary issues posed are whether these statutory procedures can withstand constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment, or under the Supremacy Clause because of their direct and dramatic conflict with the federal antitrust laws.[2] The court below held the challenged procedures constitutionally infirm on due process grounds, and consequently did not reach the antitrust issues presented.

---

[1] For ease of reference, New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California and the Director of the Department of Motor Vehicles of the State of California, appellants in No. 77-837, will be referred to as "State Appellants," and Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California, appellants in No. 77-849, as "Intervenor Appellants."

[2] It should be stressed at the outset that what is *not* at issue in this case is the unquestioned power of the state to regulate in the area of automobile franchising. What is at issue is whether the state has exercised that regulatory power in a manner which contravenes the Due Process and Supremacy Clauses of the United States Constitution.

1. The Challenged Portions of the State Statute

The provisions of the Act at issue provide that before an automobile manufacturer and its proposed or existing franchisee may establish a new automobile dealership or relocate an existing one, written notice of the proposed establishment or relocation must be given to the New Motor Vehicle Board and to all existing dealers for the "same line-make" within the "relevant market area." Cal. Veh. Code § 3062. The "relevant market area" is defined as the "area within a radius of 10 miles from the site of a potential new dealership" (approximately 314 square miles). Cal. Veh. Code § 507.

Any existing dealer receiving such a notice (i.e., any direct competitor of the potential new or relocated dealership within the 314 square mile area) may, within 15 days thereafter, file with the Board a "protest" to the proposed establishment or relocation of the competitive dealership. Such a protest, as the court below found, may (and usually does) consist of nothing more than a letter stating "I protest." The Act requires no showing of any kind, nor indeed even a contention, by the protesting dealer that the proposed establishment or relocation will have any impact upon his operations, that it is in any way unfair or inimical to the public interest, or that there is any likelihood whatever that the protesting dealer will be able to sustain his protest on the merits.

The mere sending of the protest letter is enough to prevent the establishment or relocation of the competitive dealership, because upon receipt of such a protest, the Board is required by the Act automatically — without affording the affected parties prior notice or opportunity to be heard, without any showing of good cause by the protesting party, and without any preliminary determination or inquiry into the merits of the protest — to issue an order enjoining the proposed establishment

or relocation of the dealership until the Board has held a hearing and made a final decision as to whether or not "there is good cause for not permitting such dealership." Cal. Veh. Code § 3062. In contrast to procedures surrounding issuance of judicial restraining orders, there is no provision in the Act for hearing any challenge to an improvidently-issued injunctive order prior to the Board's final decision. Establishment or relocation of the proposed franchise in violation of the Board's injunctive order is criminally punishable as a misdemeanor, Cal. Veh. Code §§ 11713.2(*l*) and 40000.11, and constitutes grounds for suspension or revocation of the manufacturer's and dealer's licenses to do business in California. Cal. Veh. Code § 11705(a)(10).

In addition to issuing the injunctive order, the Board is required upon receiving a protest to issue an order fixing the time for a hearing within sixty days following such order. Cal. Veh. Code § 3066(a).[3] When a hearing finally does occur, it may be before the Board or before a hearing officer designated by the Board. Cal. Veh. Code § 3066(a). If the matter is heard by the Board itself, and the Board fails to act within thirty days after such hearing, the proposed action is deemed approved. Cal. Veh. Code § 3067. If, however, the matter is heard by a hearing officer, the officer is required to submit a proposed decision to the Board, Cal. Gov. Code § 11517(b), and there is no time limit set for the submission of that proposed decision. After it receives the proposed decision, the Board has thirty days to affirm or reverse, Cal. Veh. Code § 3067, unless the Board desires to hold further proceedings, in which case there is no time limit for decision. The Board need only issue a decision "within

[3] Although the court below was "inclined to interpret the Act as requiring the injunction and the order [setting hearing] to be promulgated concurrently," it noted that in the case of appellee Orrin W. Fox Co., the Board waited six weeks after issuing the injunction before it issued its order setting a hearing date.

such period as may be necessitated" by the additional proceedings. Cal. Veh. Code § 3067.

2. The Factual Setting: Impact Upon Appellees and Others Similarly Situated

The grievous impact which the challenged procedures have had upon those who seek to relocate or establish automobile dealerships is graphically demonstrated by the experience of appellees under the Act.[4]

In May 1975, appellee Orrin W. Fox Co. entered into a franchise agreement with appellee General Motors for establishment of a Buick dealership in Pasadena, California. After more than 40 years of continuous Buick representation, Pasadena's only Buick dealer had terminated his franchise over a year earlier, and no replacement dealer had yet been established. Nonetheless, protests were promptly filed by two dealers located in adjacent cities, and appellees were thereafter automatically enjoined from establishing the dealership. In July 1975, the Board noticed the protests for hearing. The hearing was initially set for August 1975, but as a result of delays was in fact not held until September 1976. Opinion at 32-33. The Board ultimately found the protests to be without merit. But, "under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay." Opinion at 33.

[4] The factual narrative in this section is drawn from the findings of the court below, which were based upon "the uncontradicted affidavits and documentary exhibits submitted by the parties." State Appellants' Jurisdictional Statement Exhibit A (hereinafter "Opinion") at 32.

The deprivation inflicted by the Act's challenged procedures upon appellee Muller Chevrolet also resulted in a costly loss. Muller was an existing Chevrolet dealer who sought to relocate from antiquated, inadequate and rapidly deteriorating physical facilities to a larger and modern location a short distance away, from which another automobile dealer contemplated moving. After a year of complex and time-consuming negotiations, Muller obtained a leasehold agreement and in January 1976, General Motors gave notice of Muller's intent to relocate to the nearby facilities. In February 1976, however, two dealers located in other cities within the 314 square mile "relevant market area," sent letters to the Board "saying, in effect, no more than 'I protest.'" Opinion at 33-34. The Board issued its automatic order enjoining Muller's relocation and subsequently scheduled a hearing for June, more than four months after issuance of the injunction. Despite the fact that appellee Muller ultimately prevailed on the merits of the protests, it was a Pyrrhic victory, for in the course of the nine-month delay occasioned by the unmeritorious protests, "Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon 'gave up' with respect to this litigation and is starting all over again in his attempt to find a new site for his business." Opinion at 35. Should he succeed in finding such a new site, of course, appellee will again face under the Act the same prospect of a competitor's bald protest, an automatic injunctive order of indeterminate duration preventing the relocation, costly delay and possible ultimate loss of the proposed relocation premises.

3. Proceedings Below

On April 13, 1976, appellees filed the instant action in the United States District Court for the Central District

of California seeking to have the challenged portions of the Act declared unconstitutional, on their face and as administered, and to enjoin their enforcement. The complaint alleged *inter alia* that the provisions of the Act in question violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they permitted private automobile dealers arbitrarily to obtain injunctive orders restraining competing dealers from establishing or relocating dealerships in "their" relevant market areas, without affording the affected parties any prior or prompt opportunity to be heard, without any showing of good cause by the protesting dealer and without any prior review or investigation by a public official or agency; that such portions of the Act were in direct conflict with the federal antitrust laws and therefore invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2); and that the Act imposed an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). A three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

On June 7, 1976, appellees moved for partial summary judgment on the Due Process and Supremacy Clause challenges to the Act. After extensive briefing by the parties, the court held argument on September 20, 1976.

One year later, on September 14, 1977, the three-judge court issued its decision declaring the challenged portions of the Act unconstitutional and enjoining their implementation and enforcement. In a twelve-page opinion, the court unanimously held that the statutory procedures were "in gross violation of the Due Process Clause of the Fourteenth Amendment." Opinion at 35.

The court below noted that under the decisions of this Court, the right to "liberty" protected under the Due

Process Clause includes the freedom "to engage in any of the common occupations of life." While certainly not unlimited or shielded from state regulation, such liberty rights may be restricted or abridged only in conformity with the constitutional guarantees of procedural due process of law. Opinion at 35. Central to such due process guarantees, noted the court, is the opportunity for a meaningful hearing prior to the abridgment of one's protected liberty interests. Opinion at 35-37.

The challenged procedures, the court below found, provide the affected parties with no such opportunity to be heard prior to having their protected liberty interests abridged. Rather, the procedures empower private automobile dealers, on their own and without any governmental determination or inquiry, to restrict others from relocating in new facilities or from establishing new dealerships by the mere filing of a simple "protest." "Little imagination is needed," noted the court, "in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probably [*sic*] success, irreparable injury if his protest is not granted, or a bond or any other undertaking." The unrestricted operation of such delegated power in the hands of private businesses, the court found, "could seriously hamper or even completely destroy" proposed competing operations. Opinion at 32.

The court rejected appellants' contention that there was sufficient justification in this case for the immediate abridgment of rights prior to any hearing, noting that this Court has sanctioned such action only in "extraordinary situations . . . when a responsible public official concludes that to delay action pending a hearing would likely result in serious harm to the public." Opinion at 36-37. The court contrasted the unrestricted power to cause the issuance of an administrative injunction

granted to private parties by the Act, with the procedural safeguards and court scrutiny involved when private parties seek a judicial preliminary restraining order. Opinion at 37.

In view of its findings on the due process issues, the court found it unnecessary to reach the antitrust/Supremacy question presented. Opinion at 38.

Finally, the court addressed the abstention issue raised by appellants. Noting that there was no state litigation pending which potentially "would result in an adjudication that would deal with the constitutional problem here presented," and finding that the Act is "clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process," the three-judge court concluded that it need not and, indeed, could not abstain from adjudicating the federal constitutional issues presented. Opinion at 38-40.

QUESTIONS PRESENTED

1. Was the three-judge court correct in holding that the challenged portions of the California Automobile Franchise Act are invalid under the Due Process Clause of the Fourteenth Amendment because they empower private automobile dealers arbitrarily to restrain competitors from establishing or relocating dealerships in "their" relevant market areas, without affording the affected parties any prior opportunity to be heard, without requiring any showing of good cause and without any prior review or investigation by a public entity or official?

2. Was the court below required to abstain from adjudicating the federal constitutional issues posed by the state statute, where the court found that the Act was unambiguous and that there was no state litigation pending which might resolve or eliminate the federal issues

presented, and where no uncertain state law issues existed which could potentially harmonize the Act with federal constitutional requirements?

3. Is the California Act invalid under the Supremacy Clause because it conflicts with federal antitrust laws?[5]

[5] If this Court should note probable jurisdiction, appellees will also brief and argue, as an alternative ground for affirming the judgment of the Court below, that the challenged portions of the California Act are invalid under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) because they impose an undue burden on interstate commerce. *See General GMC Trucks, Inc. v. General Motors Corp.*, 329 Ga. 373, 237 S.E.2d 194, *cert. denied*, 46 U.S.L.W. 3389 (1977).

ARGUMENT

Appellants assert that the instant appeal presents for review a number of substantial questions, particularly with regard to the due process issues involved, which appellants claim were erroneously decided by the court below. In fact, as appellees will demonstrate, the three-judge court's resolution of those issues was manifestly correct, and should be summarily affirmed by this Court without further briefing or argument. *See, e.g., Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971). This Court has on numerous occasions in the last several years addressed itself to the procedural due process requirements of the Fourteenth Amendment and to the parameters of the "liberty" and "property" interests protected thereunder.[6] Hence this appeal is not a case where the Court is called upon to address novel or unresolved issues of a substantial nature. Nor have appellants pointed to any conflict in decision by the lower courts which requires resolution by this tribunal.[7] Finally, even if this Court should conclude that the due process questions presented by appellants would otherwise be substantial enough to warrant further briefing and argument, appellees submit that the judgment below should nonetheless be summarily affirmed, because the portions of the Act declared unconstitutional by the three-judge court on due process grounds are patently invalid as well under the

[6] *See, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

[7] The Georgia Supreme Court recently invalidated that state's parallel automobile dealership establishment and relocation provisions on Commerce Clause grounds. *General GMC Trucks, Inc. v. General Motors Corp.*, 329 Ga. 373, 237 S.E.2d 194 (1977). This Court denied certiorari. 46 U.S.L.W. 3389 (December 12, 1977).

Supremacy Clause, in view of their clear conflict with the federal antitrust laws.[8]

I. THE THREE-JUDGE COURT'S RULING THAT THE CHALLENGED PORTIONS OF THE ACT ARE IN GROSS VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS MANIFESTLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED

A. The Statutory Procedures Which Permit Private Automobile Dealers Arbitrarily To Restrain Competitors From Establishing or Relocating Dealerships in "Their" Relevant Market Areas Without Affording the Affected Parties Any Prior Opportunity To Be Heard and Without Any Prior Review by a Public Entity Clearly Violate Due Process Guarantees

While there has indeed been controversy over the meaning of the Due Process Clause, there can be no doubt that at minimum due process requires that when the state seeks to deprive a person of life, liberty or property, it must afford notice and a meaningful opportunity to be heard *prior* to imposing the deprivation. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This cardinal principle, fundamental to the concept of due process of law, has been repeatedly reaffirmed by this Court. *E.g. Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-40 (1969).

Matched against this minimum standard of due process, the three-judge court correctly found the challenged

[8] As previously noted, the three-judge court found it unnecessary to address this point in view of its resolution of the due process challenge to the Act. This Court, of course, is free to consider any alternative grounds on which the judgment may be affirmed, including those not reached by the court below. *Langnes v. Green*, 282 U.S. 531, 535-39 (1931).

establishment and relocation provisions of the Act to be grossly deficient. Those provisions permit a private automobile dealer to obtain an automatic injunction restraining the establishment or relocation of a competitive dealership within the 314 square mile "relevant market area," without affording the affected parties any prior notice or opportunity to be heard, without any showing of necessity or likelihood of prevailing on the merits of the protest, and without any review or determination by a public official. The enjoined parties are thus deprived, without a hearing of any kind, of the right to operate their businesses for lengthy periods of indefinite and potentially permanent duration.

The establishment and relocation provisions of the Act thus transgress the fundamental principles of due process in precisely the same manner as the state replevin statutes struck down by this Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972). Those defective statutes, noted the Court, "provide[d] for the issuance of writs ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing." *Id.* 407 U.S. at 69-70. "There is no requirement," the Court continued, "that the applicant make a convincing showing . . . that the goods are, in fact, 'wrongfully detained'. Rather [the] law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily." *Id.* 407 U.S. at 73-74. The affected party "is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing. . . ." *Id.* 407 U.S. at 75.

Moreover, what is perhaps the most invidious defect in this Act's establishment and relocation procedures was

also common to the statutes condemned in *Fuentes*. As this Court noted:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." *Id.* 407 U.S. at 93.

The parallels between the replevin statutes invalidated in *Fuentes* and the challenged portions of the Act are striking and inescapable. Indeed, to the extent there are differences, they render the correctness of the decision below even more compelling. The replevin statutes in *Fuentes* at least required the posting of a bond and, in the case of one of the statutes, a declaration under oath as to the ultimate entitlement of the person to the requested relief. Neither of those "safeguards," as inadequate as this Court found them to be, are present in the case of the instant statute.

There can be no serious question, therefore, as to the failure of the challenged provisions of the Act to measure up to the rudimentary standards of due process. The only questions which appellants raise with respect to the three-judge court's ruling on this point are neither substantial nor novel, but have been squarely decided by this Court adversely to appellants.

Appellants contend that since the deprivation inflicted by the challenged procedures is temporary and since a hearing is ultimately held at some point later in the process, the requirements of due process are satisfied. State Appellants' Jurisdictional Statement at 13-15; Intervenor Appellants' Jurisdictional Statement at 13-14. Those contentions have been flatly rejected by this Court. *Fuentes, supra,* 407 U.S. at 84-86; *Goss v. Lopez,* 419 U.S. 565, 575-76 (1975).

Likewise appellants' suggestion that the requirement of a pre-deprivation opportunity to be heard is applicable only to grievous losses of "the very means by which to live," (State Appellants' Jurisdictional Statement at 15-17), has similarly been dismissed by this Court on more than one occasion. *Fuentes, supra,* 407 U.S. at 88-90; *Goss v. Lopez, supra,* 419 U.S. at 575-76. Nor is this Court's decision in *Mathews v. Eldridge,* 424 U.S. 319 (1976), upon which appellants rely, to the contrary.[9] Rather, *Mathews* is in accord with the basic principle that "the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of a hearing, 'is not decisive of the basic right' to a hearing of some kind." *Goss v. Lopez, supra,* 419 U.S. at 576; *Fuentes, supra,* 407 U.S. at 86.

Equally unpersuasive is appellants' effort to justify the Act's procedures on the basis of those rare emergency

[9] In upholding federal procedures which provided something less than a full judicially-modeled evidentiary hearing prior to non-final termination of Social Security disability benefits, the Court in *Mathews* based its decision on at least three crucial factors present in that case which are patently lacking here: (1) The pre-hearing termination decision was made by a responsible unbiased public official. *Id.* 424 U.S. at 349. (2) The public official's decision was based upon objective, reliable data as to the merits of the ultimate question. *Id.* at 343-47. (3) The affected party was afforded an opportunity to assert his claim, to submit evidence and arguments on his behalf, and to challenge the correctness of the agency's tentative conclusions *prior to any administrative action*. *Id.* at 346, 349. None of these procedural safeguards are afforded affected parties under the Act in this case. Furthermore, the Court in *Mathews* noted that in that case, "a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails." *Id.* at 340. In contrast, parties who ultimately prevail under the Act involved here not only are uncompensated for their pre hearing deprivation but may even suffer permanent loss of their interest prior to the final decision, as was the case with appellee Muller.

situations in which this Court has permitted immediate summary governmental deprivations. There is entirely lacking in this case any of the factors which this Court has deemed essential to justify such summary procedures. *See Fuentes, supra,* 407 U.S. at 91. *See also, Randone v. Appellate Dep't,* 5 Cal.3d 536, 554, 488 P.2d 13, 24-25 (1971).[10]

B. The Affected Interests of Appellees are Protected Under the Fourteenth Amendment

Appellants further contend that the challenged procedures are not invalid under the Due Process Clause because the interests so dramatically affected by the Act are not protected under the Fourteenth Amendment. State Appellants' Jurisdictional Statement at 11-12; Intervenor Appellants' Jurisdictional Statement at 9-13. Such a contention, however, cannot withstand analysis in the light of this Court's decisions.

The Fourteenth Amendment's protection against deprivation without due process of law extends, of course, to deprivations of liberty as well as to those of property. For more than a half-century, since *Meyer v. Nebraska,* 262 U.S. 390 (1923), this Court has recognized that the "liberty" so protected includes the right to engage in business occupations.[11] As the Court stated in *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972):

[10] Those necessary factors enumerated by this Court include: (1) strict control by the state over its monopoly of legitimate force, so that the summary procedures are only initiated by a government official, who might reasonably be expected to serve general public interests rather than secure private advantage; (2) a narrowly drawn statute which provides the government official with meaningful standards to determine whether the summary procedure is necessary and justified in a particular instance; (3) a special need for very prompt action; and (4) a direct necessity for the summary procedures to serve an important governmental or general public, as opposed to a private, interest.

[11] Mr. Justice Rehnquist's criticism of the court below for its reliance on *Meyer* for this point of law, Opinion on Application for Stay at 3-4 (December 6, 1977, Rehnquist, Circuit Justice),

> "'While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right . . . to engage in any of the common occupations of life . . . .' *Meyer v. Nebraska,* 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

There should be no question, therefore, that the right of a person to engage in the occupation of an automobile dealer, as with other occupations,[12] is a "liberty" interest protected against deprivation without due process of law.

Nor can there be any real doubt that those persons against whom the Act's summary injunctive procedures are invoked suffer a deprivation of that protected interest. They may be restrained for an indefinite period from engaging in their livelihood. Those dealers who have a contractual agreement with a manufacturer to establish a new dealership are completely barred from their chosen profession. Even more perniciously, existing dealers who are forced to relocate involuntarily, because their facilities have been condemned, destroyed or rendered unavailable (*e.g.,* through inability to renew a lease) may be effectively put out of business by their competitors. These deprivations, it cannot be stressed

is most perplexing. Not only has this Court itself in recent years relied upon the identical quoted portion of *Meyer* for precisely the same proposition, *See Board of Regents v. Roth,* 408 U.S. 564, 572 (1972), and *Ingraham v. Wright,* 430 U.S. 651, 673 (1977), but Mr. Justice Rehnquist joined in both those opinions.

[12] *See, e.g., Feinberg v. Federal Deposit Insurance Corp.,* 522 F.2d 1335, 1340 n.8 (D.C. Cir. 1975) (bank president); *Keker v. Procunier,* 398 F.Supp. 756, 760 (E.D. Cal. 1975) (attorney); *Larkin v. Bruce,* 352 F.Supp. 1076, 1077 (E.D. Wisc. 1972) (doctor). A statute which purported to empower attorneys or doctors arbitrarily to restrain other practioners from establishing or relocating practices nearby, under the procedures set forth in the Act here, would surely be held unconstitutional.

too strongly, are not uniformly visited upon all members of the occupational group who seek to establish or relocate dealerships, nor do they occur as a result of any deliberative determination by a public official that the public interest so requires. Rather, they are inflicted arbitrarily, upon the mere request of a self-interested private competitor, who himself already enjoys those rights.

Appellants assert, purporting to rely upon *Paul v. Davis*, 424 U.S. 693, 710-11 (1976), that the liberty interests here affected by the Act are not protected because, with the exception of those few liberties spelled out in the Bill of Rights, a liberty interest is protected against state deprivation by the Fourteenth Amendment only if the state has chosen to recognize that liberty interest. State Appellants' Jurisdictional Statement at 11-12; Intervenor Appellants' Jurisdictional Statement at 11.

Not only does this absurdity of circular reasoning evidence a fundamental misunderstanding of the nature and source of American liberties,[13] but it misrepresents the holding of *Paul v. Davis* as well. When this Court indicated in that case that certain interests protected under the Fourteenth Amendment "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law," it made

[13] There is surely no principle more fundamental to the American concept of limited government than the principle that an individual does not derive his right to liberty as the result of a grant from the state. On the contrary, the state derives its limited powers as the result of a grant from the people. To say that the Fourteenth Amendment restricts a state from depriving a person of liberty without due process of law, but that the state is free to recognize, define and delineate liberty as it chooses, would obviously render meaningless that protection. Liberty is not a state-created right. *Logan v. United States*, 144 U.S. 263, 287 (1892) ("[T]he rights of life and liberty were not granted by the Constitution, but were natural and inalienable rights of man."); *cf. Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell and Blackmun, JJ., concurring in part).

explicitly clear the fact that it was speaking not of "liberty" in its traditional sense (*i.e.*, freedom from governmental restraint) as is involved in this case, but rather of those entitlements or benefits which are the creations of the state in the first instance, such as good-time credits in prison — those "variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." *Id.* 424 U.S. at 710. To apply the same rule to basic liberty interests, which do *not* derive their constitutional status as a result of creation by the state, would, as noted, render the Fourteenth Amendment's protection against their deprivation virtually meaningless.

Furthermore, the liberty interests affected by the Act would be protected even under the terms of appellants' proposed "state-recognition" rule. Not only has the State of California regulated since 1923 and licensed since 1957, the right of a person to engage in the occupation of an automobile dealer (State Appellants' Jurisdictional Statement at 5, n.1),[14] but California specifically recognizes the right to operate an automobile dealership as an interest protected under the Fourteenth Amendment.

[14] Mr. Justice Rehnquist's tentative conclusion that the affected interests involved here are not protected under the Fourteenth Amendment appears to have been based at least in part upon his misimpression that prior to passage of this Act, there was an "absence of state regulation in the field." Opinion on Application for Stay at 4. Mr. Justice Rehnquist further indicated that, "If California had by statute conferred upon automobile dealers the right to establish and relocate franchises wherever they chose, and then imposed procedural hurdle[s] such as the one here in question before the right could be effectuated," his conclusion might well be different. *Id.* at 5. That is, in fact, precisely the situation in this case. Since 1957, a licensed automobile dealer in California could establish or relocate his dealership at any location he chose, as long as he merely notified the Department of Motor Vehicles of the place where he was establishing or relocating the dealership. Cal. Veh. Code § 11712(a). Not until passage of this Act in 1973, were persons subject to arbitrary abridgment of this statutorily-recognized right without any opportunity to be heard.

See Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd., 30 Cal.App.3d 494, 500-01, 106 Cal.Rptr. 340, 344 (1973).

Finally, this Court has suggested as well that the right to the benefits of an automobile franchise is precisely the sort of "entitlement" which is included in our modern-day concept of "property" as protected under the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1965). Such an "entitlement" is not, as appellants suggest, a mere unprotected "expectancy," but is instead supported by mutual and explicit contractual understandings between franchisor and franchisee. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The summary injunctive procedures of the Act deprive the affected individuals of the benefits of the use of that property without due process of law.

II. THE DISTRICT COURT WAS NOT REQUIRED TO ABSTAIN FROM ADJUDICATING THE FEDERAL CONSTITUTIONAL ISSUES POSED BY THE STATE STATUTE, WHERE THE COURT FOUND THAT THE STATE ACT WAS UNAMBIGUOUS AND THAT NO STATE LITIGATION WAS PENDING WHICH MIGHT RESOLVE OR ELIMINATE THE FEDERAL ISSUES PRESENTED, AND WHERE THERE WERE NO UNCERTAIN STATE LAW ISSUES WHICH COULD POTENTIALLY HARMONIZE THE ACT WITH FEDERAL CONSTITUTIONAL REQUIREMENTS

State Appellants contend that the district court was required under this Court's decisions in *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975), and *Bellotti v. Baird*, 428 U.S. 132 (1976), to abstain from adjudicating the federal constitutional issues tendered in this action because of the postulated "existence of issues of state law whose resolution in the State forum would

at the very least substantially modify [those] federal issues." State Appellants' Jurisdictional Statement at 18-25. Such a contention is patently without merit and was correctly rejected by the court below after careful and responsible consideration.

Having considered both of the proffered interpretations of the Act and the claimed uncertain issue of state law which appellants now repeat to this Court, the three-judge court found the Act "to be clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process." Opinion at 39. The court further noted that it had withheld its decision in this matter for several months to await resolution of various pending state cases which, although they involved issues wholly unrelated to those presented in the instant case, appellants had suggested could unexpectedly result in an adjudication which would in some unexplained manner affect the resolution of this case. That had not occurred. The district court concluded that under such circumstances, abstention was not called for, and it was obliged to act. Opinion at 39.

The court's conclusion was manifestly correct. *See Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965). This Court's decisions in *Harris County* and *Bellotti* do not indicate otherwise. This is in no manner a case, as in *Harris County*, where "the federal claim . . . is 'entangled in a skein of state law that must be untangled before the federal case can proceed.'" *Harris County Commissioners Court v. Moore, supra*, 420 U.S. at 88. Nor is it a case, such as *Bellotti*, where there is an ambiguous state statute which is susceptible of a construction by the state courts which might avoid or materially resolve the federal constitutional issues (the court below specifically found to the contrary) and where the high court of the state has a certification procedure by which that ambiguity can easily and quickly be resolved. *Bellotti v. Baird, supra*, 428 U.S. at 138-39, 150-51.

In concluding that abstention was not called for in this case, the court below was no doubt mindful of this Court's teaching in *Harris County Commissioners Court v. Moore, supra,* 420 U.S. at 83:

> "We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in 'special circumstances', [citation] and only upon careful consideration of the facts of each case."

This is surely not such a "special circumstance." State Appellants' claim of the existence of an "uncertain issue of state law" and of two alleged ambiguities in the statute remain as unpersuasive on appeal as they did below.

The "uncertain issue of state law" which appellants have concocted is particularly absurd. Appellants theorize (although they certainly do not urge such a construction themselves) that a hearing might be required prior to issuance of the Board's injunction as a matter of state law, under *Endler v. Schutzbank,* 68 Cal.2d 162, 436 P.2d 297 (1968).[15] Such a contention is nonsense, because *Endler* is wholly irrelevant to this case for two important reasons.

First, the California Financial Code sections which provided statutory authority for the hearing to which

[15] *Endler* simply held that a complaint which alleged that plaintiff was denied the opportunity to pursue his licensed occupation as a financial broker because of unfounded allegations by the State Commissioner of Corporations of dishonesty, which plaintiff had never been given an opportunity to rebut, stated a cause of action for denial of due process rights, as a matter of *federal constitutional law. Id.* 68 Cal.2d at 169-70, 436 P.2d at 302. The Court went on to note that if plaintiff proved such a denial of federal constitutional rights, the Commissioner of Corporations had statutory authority under sections of the California Financial Code – wholly inapplicable to the Vehicle Code Act involved here – to provide the hearing to which plaintiff was entitled under the Fourteenth Amendment. *Id.* 68 Cal.2d at 182 n.16, 436 P.2d at 311 n.16.

plaintiff in *Endler* was, as a matter of federal constitutional law, entitled are not incorporated in and are wholly inapplicable to this Act. It is manifestly clear that nowhere in the Act is any provision made for a hearing prior to issuance of the automatic injunction.[16] The Act is, as the three-judge court found, unambiguous on that point. Hence even if the state courts were to "search the governing statute to find the necessary authority for the agency to provide a hearing" prior to issuance of the automatic injunction, as appellants suggest they might under *Endler* (State Appellants' Jurisdictional Statement at 20), they would clearly find none in this Act.

Secondly, appellants' contention that resolution of the federal constitutional issue could be avoided under *Endler* is obviously not correct. *Endler* held that *if* a plaintiff proved he has a right to a hearing under the Fourteenth Amendment, he should be given an administrative (as opposed to a judicial) hearing if the state officer or agency has statutory authority to provide one. Hence, this is clearly not a situation where the federal constitutional issue turns upon or may be avoided by the resolution of some uncertain issue of state law. Rather, even to reach the *Endler* state law issue, one must first resolve the basic federal constitutional issue, which federal issue appellants would have the district court abstain from deciding. Such a contention turns the doctrine of absention on its head.

Appellants' two remaining "ambiguities" bear little further discussion. Appellants' point that the Board "could" hold the protest hearing as early as a state court might require it to be held (State Appellants' Jurisdic-

[16] Appellants' suggestion that § 3067 of the Act might make provision for such pre-injunction hearing (State Appellants' Jurisdictional Statement at 20-21) is simply false. § 3067 deals explicitly with hearings by the Board following submission of the hearing officer's proposed decision. *Id.* Exhibit H at 76. This, of course, occurs long after issuance of the automatic injunction.

tional Statement at 21) proves nothing. Section 3062 has no requirement for a prompt hearing; State Appellants have not provided affected parties with such a prompt hearing; and appellants cite no authority whatever for the proposition that such a prompt hearing might be required as a matter of state law. Appellants' final point that a state court "may" construe § 3062 of the Act to require "advance notice" of proposed establishments or relocations (State Appellants' Jurisdictional Statement at 22) is equally beside the point. Appellants again cite no authority for the theory that such "advance notice" might be required as a matter of state law. Such a construction, moreover, would in no way substantially affect the basic constitutional issue of whether private parties can be permitted arbitrarily to restrain the liberty of others without affording the affected parties an opportunity to be heard.[17]

To hold that the district court below was required to abstain from adjudicating the denial of important federal constitutional rights which this case presented, on the basis of the unsupportable and speculative contentions made by appellants would conflict with the recent admonition of this Court in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481 (1977):

> "As has been noted, *Pullman* abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or materially alter the constitutional issue presented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented. That point has been reached and surpassed here."

[17] Appellants' brief reference in a footnote to two pending state court cases involving the Act (State Appellants' Jurisdictional Statement at 25 n.4) deserves an equally brief reply. Those cases, with which the court below was thoroughly familiar, involve challenges to the Act which, as appellants have readily admitted, are wholly unrelated to the issues in this case.

III. THE JUDGMENT OF THE COURT BELOW SHOULD BE SUMMARILY AFFIRMED ON THE ALTERNATIVE GROUND THAT THE CHALLENGED PORTIONS OF THE ACT SQUARELY CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE INVALID UNDER THE SUPREMACY CLAUSE

Even if this Court should conclude that the due process questions presented by appellants would otherwise be substantial enough to warrant further briefing and argument, the judgment of the three-judge court should nonetheless be summarily affirmed. The establishment and relocation provisions of the Act effect restraints on trade which are patently inconsistent with and contrary to the mandate of the Sherman Act. Hence those provisions, which the court below found to be unconstitutional on due process grounds, must fall as well under the Supremacy Clause.

It is well established that horizontally imposed territorial trade restraints and market allocations constitute *per se* violations of the Sherman Act. *United States v. Topco Associates*, 405 U.S. 596, 608 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Yet these unlawful trade restraints and market allocations are facilitated and encouraged under the provisions of the state Act in question.

The Act gives existing automobile dealers within the "relevant market area", acting alone or in concert, the unrestrained power unilaterally to invoke an injunctive order against the establishment or relocation of an existing or potential competitor. Because the injunction is automatic and because there is no requirement for a prompt hearing and decision on the merits following peremptory issuance of the injunction, existing dealers are able to protect, for a lengthy period of indefinite duration, the 314 square mile area within which they do business from the entry of new competition as well as from the

relocation of existing dealerships with which they may already compete.

That this scheme of horizontally-imposed territorial trade restraints facilitated by the state statute is proscribed by the Sherman Act is evidenced by its comparison with an almost identical scheme considered by the Third Circuit in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). When a new franchise application was submitted to Holiday Inns, the company sent notices to at least three of the existing Holiday Inn franchisees nearest the proposed site. If one or more of the notified franchisees protested the proposed franchise, the new franchise could be established only after review and approval by the company's executive committee. "By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the . . . market," ruled the court, defendant "enabled its franchisees already in the . . . area to divide the market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act." *Id.* 521 F.2d at 1242.

The provisions of the Act which give existing automobile franchisees the power to restrain new competitive entry in their areas are strikingly parallel to the scheme condemned in *American Motor Inns.* The Act thus purports to authorize and indeed promotes private conduct clearly proscribed by, and in conflict with, the antitrust laws of the United States. State Appellants attempted below to close the court's eyes to this conflict by reference to this Court's observation in *Joseph E. Seagram & Sons. v. Hostetter,* 384 U.S. 35 (1966), that in areas of coincident federal and state regulation, courts should avoid "seeking out" conflicts where none clearly exist.[18] That observation, however, was made in the context of a state

[18] The attempt below by the California Attorney General, in his present role as advocate on behalf of State Appellants, to deny the anticompetitive effect of the Act and its conflict with the antitrust laws is in sharp and telling contrast to his earlier opposition to the Act on precisely the same grounds advanced by appellees. In opposing the challenged portions of the Act when they were before the California Legislature, the California Attorney General observed, "Assembly Bill 225 [the Act] which has been reviewed by our legal staff, has an apparent anticompetitive effect on the new car market." After describing the establishment and relocation provisions of the Act, the Attorney General continued, "The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law. Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963)." "The anticompetitive aspects of Assembly Bill 225," the Attorney General concluded, "force us to take a position of opposition." Letter of August 3, 1973 from Attorney General Evelle Younger of the State of California to Assemblyman J. A. Gonsalves of the California State Assembly. Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, Exhibit A.

statutory price reporting provision which itself had no anticompetitive effect and did not specifically authorize anticompetitive acts.[19] In order for there to be any Sherman Act violation, action would have had to be taken beyond the parameters of the statute through misuse of the reported price information. In contrast, the Act at issue in this case mandates the issuance of an injunction restraining competition upon the filing of a protest by an existing automobile dealer. The existing dealers need do nothing outside the parameters of the statute to effect the horizontal restraint on trade which is a *per se* violation of the Sherman Act.

Because the Act thus facilitates and promotes private conduct clearly proscribed by the antitrust laws of the United States and is in conflict with the operation and underlying economic policy of those federal statutes, the challenged state provisions must fall under the Suprem-

[19] The challenged New York statute in *Seagram* required distillers to file their monthly price schedules for sales to wholesalers and retailers together with an affirmation that such prices were "no higher than the lowest price" at which sales were made by the distiller or by wholesalers who distributed substantial amounts of the distiller's brand.

acy Clause. As this Court explained in *Perez v. Campbell*, 402 U.S. 637, 649 (1971):

> "As early as *Gibbons v. Ogden*, 9 Wheat 1 (1824), Chief Justice Marshall stated the governing principle — that 'acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause. *Id.* at 211 . . . '[i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (Emphasis by the Court.)

The Act's invidious impact on competition and its patent conflict with the federal antitrust laws cannot be shielded from Supremacy Clause invalidation under the narrow, and ever-shrinking, state action umbrella of *Parker v. Brown*, 317 U.S. 341 (1943). Unlike the present case, the Court in *Parker* was faced with a state statute which was consistent with a clearly expressed federal regulatory policy. This crucial distinction was well explained by the court of appeals in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 936 (D.C. Cir. 1971) *cert. denied*, 404 U.S. 1047 (1972):

> "Since the Court [in *Parker v. Brown*] found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, *i.e.*, state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the

> prohibitions of the antitrust laws to this type state regulatory action."

In contrast to *Parker*, Congress has evidenced no such intent to carve an exemption for automobile franchising from the national policy of free competition as reflected in the antitrust laws. To the contrary, Congress has specifically expressed its intent to preserve and enhance competition in the area of automobile franchising, and its desire that the antitrust laws remain in force in that economic sphere. In enacting the Automobile Dealers' Day in Court Act (15 U.S.C. §§ 1221-1225), which gave automobile franchisees a statutory right to sue franchisors for acts or threats of coercion or intimidation in connection with the performance or termination of any franchise agreement, Congress took care to make clear its intent that the legislation did not "repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States." 15 U.S.C. § 1224. Congress' preeminent concern with the preservation of pro-competitive antitrust policies in this area was spelled out in the report on the legislation by the House Committee on the Judiciary, which emphasized:

> "[T]he bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of this legislation.*" H. R. Rep. No. 2850, 84th Cong., 1st Sess. (1956) (Emphasis added).

The California Automobile Franchise Act is precisely the sort of "curtailment" of normal competition that the House Judiciary Committee regarded as "inconsistent" with Congress' antitrust objectives in the area of automobile franchising and consequently cannot qualify for exemption under the doctrine of *Parker v. Brown*.

Moreover, appellants' attempt below to invoke the narrow *Parker* exemption in this case confuses the question of whether state officials are insulated from liability under the Sherman Act for anticompetitive acts, with the very different question of whether a state statute which conflicts with federal law must give way under the Supremacy Clause. As this Court recently made clear in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 588-90 [Part II, plurality opinion of Stevens, Brennan, White and Marshall, J.J.] 606-07, 613-14 n.5 [concurring opinion of Blackmun, J.] (1976), it is only the former question which *Parker* resolved. The latter question, which is the one presented in the instant case, is instead the issue addressed by this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

In *Schwegmann*, the Court was faced with a Louisiana law which permitted resale price maintenance agreements between distributors and retailers, and further provided that once any distributor and a single retailer had entered into such an agreement, all other retailers were compelled by law to observe the maintained minimum price for that commodity which had been agreed upon by the contracting parties. Noting that the fixing of minimum prices was illegal *per se* under the Sherman Act, the Court went on to observe as a given that "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval of Congress." *Id.* 341 U.S. at 386. The Court found a specific exemption for the voluntary resale price maintenance agreements between distributor and retailer in the Miller-Tydings amendment to the Sherman Act, but that amendment's exemption did not extend to enforcement of minimum prices against those who had not voluntarily entered into such agreements. The Court therefore concluded that only those portions of the Louisiana statute which permitted enforcement of the voluntary resale price maintenance agreements among the contracting parties escaped invalidation under the Sherman Act. *Id.* 341 U.S. at 395.

Schwegmann thus stands for the proposition that, absent an express congressional intent to the contrary, state laws which conflict with the Sherman Act are invalid under the Supremacy Clause and are unenforceable.[20] It is certainly true, as Mr. Justice Blackmun recognized in his concurring opinion in *Cantor, supra,* 428 U.S. at 609, that it would not be easy to fashion an all-inclusive rule which the courts could use readily to determine which state laws are pre-empted by federal antitrust law and to what extent. But where, as here, a state statute purports to empower private businesses unilaterally to invoke state processes to accomplish *per se* violations of the Sherman Act, it is so dramatically at odds with federal antitrust policy that the state statute must, as in *Schwegmann*, give way under the Supremacy Clause. As this Court said in *Northern Securities Co. v. United States*, 193 U.S. 197, 350 (1904):

> "[N]o state can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress."

---

[20] This is surely the intent of Congress on the matter as well. As evidenced in the 1975 repeal of the Miller-Tydings amendment to the Sherman Act, Congress has expressly recognized that state fair trade laws, absent specific Congressional exemption, must give way to the Sherman Act. In explaining the original necessity for the amendment, Senate Report No. 94-466, 94th Cong. 1st Sess. (1975) pointed out that soon after the first state fair trade law was passed in 1931, "It became apparent, however, that any state law which applied to interstate commerce violated Federal antitrust laws. Thus, in 1937, Congress passed the Miller-Tydings Act granting state fair trade laws an exemption from the Sherman Antitrust Act." Such language leaves little room for doubt as to Congressional intent that state laws inconsistent with the Sherman Act are invalid.

CONCLUSION

For all of the foregoing reasons, the judgment of the three-judge court should be summarily affirmed.

Respectfully submitted,
GIRARD E. BOUDREAU, JR.
JOHN G. NILES
ROBERT C. VANDERET
Attorneys for Appellee
General Motors
Corporation

GEORGE R. BAFFA
Attorney for Appellee
Orrin W. Fox Co.

Of Counsel:
O'MELVENY & MYERS
HAHN & HAHN
NORIN T. GRANCELL
A Professional Corporation

OTIS M. SMITH
General Counsel
ROBERT W. CULVER
General Motors Corporation

NORIN T. GRANCELL
Attorney for Appellee
Muller Chevrolet

January 30, 1978

Supreme Court, U. S.
FILED
MAY 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California,
Appellants,

VS.

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the Central District of California

BRIEF FOR APPELLANTS

EVELLE J. YOUNGER,
Attorney General of the State of California,
ROBERT L. MUKAI,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, California 95814,
Counsel for Appellant New Motor Vehicle Board of the State of California,

STEPHEN J. EGAN,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, California 95814,
Counsel for Appellants Department of Motor Vehicles of the State of California, and Doris V. Alexis, Director thereof.

PERNAU-WALSH PRINTING CO. - 862 MISSION STREET - SAN FRANCISCO, CA 94103
A BOWNE COMPANY

Subject Index

	Page
Opinion below	1
Jurisdiction	2
Questions presented	4
Constitutional provisions and statutes involved	5
Statement	5
1. The California Automobile Franchise Act	5
2. Material facts	9
a. Establishment of the Fox dealership	9
b. Relocation of the Muller dealership	11
3. Proceedings below	12
4. Opinion and judgment of the District Court	16
Summary of Argument	16
Argument	22
I. The dealer establishment and relocation provisions of California's Automobile Franchise Act, which delay proposed business expectations of franchisors and prospective franchisees pending state inquiry in the public interest, do not violate due process of law merely because they do not provide a hearing before such delay is incurred	22
A. Appellees possessed no protected rights infringed by operation of the act	22
1. Appellees possessed no liberty interest in freedom to engage in the occupation of motor vehicle sales. If such an interest exists, the act does not attempt to regulate that freedom	22
2. Appellees had no liberty or property interest in previously-unrestrained freedom to locate their facilities where they wished	30
B. Assuming that the claimed rights of appellees rise to the threshold of recognized interests protected by the due process clause, the establishment and relocation procedures of the Act satisfy the requirements of due process	34

Page

1. Mathew v. Eldridge, 424 U.S. 319 (1976) identifies the determinants of what process is due when state action constitutes a deprivation of a protected liberty or property interest 34

2. Appellees' interest in prospective establishment or relocation of their business ventures at a particular location, if within the protection of the due process clause, is low on the scale of interests so protected 35

3. The temporary deprivation of appellees' interest by necessary delay under the Act cannot be "erroneous", as that term has been limited by Dixon v. Love, 431 U.S. 105 (1977), and additional procedural safeguards are unnecessary 37

4. The interest of the state is substantial, and in light of this interest, the burdens imposed by a requirement of substitute or additional procedures cannot be justified 41

II. The District Court was required to abstain from the exercise of jurisdiction herein 44

A. The District Court was required by the doctrine of Younger v. Harris, 401 U.S. 37 (1971) to withhold relief and dismiss the suit 44

1. Abstention was required in the present case under this Court's recently articulated rules for the application of the Younger doctrine 44

2. Failure to abstain under Younger in the present case both prevents California from effectuating substantive policies and pretermits performance of the function of providing state forum for vindication of constitutional objections thereto 51

3. Neither the fact that the state adjudicatory proceedings sought to be enjoined were initially administrative, nor the fact that private interests opposed those of appellees in those proceedings should deter application of Younger to the present case 55

Page

4. Neither of the exceptions to applicability of the Younger doctrine are present in the instant case 57

B. The District Court was required to decline to exercise jurisdiction under the principles of Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 59

1. The doctrine of abstention under Pullman is applicable where, as here, there exists for resolution by the state courts issues which would render the exercise of federal jurisdiction unnecessary or significantly modify the federal claim 59

2. Pending state litigation may result in a construction of the act under state law which will obviate a ruling on appellees' federal constitutional claims 64

3. The nature of the problem presented by appellees' federal claim may be substantially altered by a state court construction of the requirements of the act 67

Conclusion 70

Table of Authorities Cited

Cases

	Pages
Adams v. Tanner, 244 U.S. 590 (1917)	25, 26, 27, 30
Allen v. California Board of Barber Examiners, 25 Cal. App.3d 1014 (1972)	63
Allgeyer v. Louisiana, 165 U.S. 578 (1897)	26
American Motors Sales Corp. v. New Motor Vehicle Board, 69 Cal.App.3d 983 (1977)	45
Armstrong v. Manzo, 380 U.S. 545 (1965)	67
Bartels v. Iowa, 262 U.S. 404 (1923)	24, 25, 26
Bayside Timber Co. v. Bd. of Supervisors, 20 Cal.App.3d 1, (1971)	63
Bixby v. Pierno, 4 Cal.3d 130 (1971)	56
Bell v. Burson, 402 U.S. 535, 539 (1971)	36, 39
Bellotti v. Baird, 428 U.S. 132 (1976)	68
Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228 (1962)	63
Board of Regents v. Roth, 408 U.S. 564 (1972)	33, 34
Dixon v. Love, 431 U.S. 105 (1977)	19, 35, 36, 37, 38, 39, 40
Endler v. Schutzbank, 68 Cal.2d 162 (1968)	64, 65, 66
Ferguson v. Skrupa, 372 U.S. 726 (1963)	27, 28
Fuentes v. Shevin, 407 U.S. 67 (1972)	16, 17
Goldberg v. Kelly, 397 U.S. 254 (1970)	19, 35, 36
Harris County Commissioners' Court v. Moore, 420 U.S. 77 (1975)	59, 60, 62, 69
Harrison v. N.A.A.C.P., 360 U.S. 167 (1959)	20, 60, 61, 62, 63, 67, 68
Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398 (1934)	37
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	4, 21, 49, 50, 55, 56, 58
Ingraham v. Wright, 430 U.S. 651 (1977)	34
Juidice v. Vail, 430 U.S. 327 (1977)	4, 21, 49, 50, 52, 53, 55, 56, 57, 58
Kelley v. Johnson, 425 U.S. 238 (1976)	27
Kugler v. Yocam, 69 Cal.2d 371 (1968)	63
Lincoln Union v. Northwestern Co., 335 U.S. 525 (1949)	26, 27
Lochner v. New York, 198 U.S. 45 (1905)	26

	Pages
Massachusetts State Grange v. Benton, 272 U.S. 525 (1926)	56
Mathews v. Eldridge, 424 U.S. 319 (1976)	19, 34, 35, 36, 43, 67
Meyer v. Nebraska, 262 U.S. 390 (1923)	18, 23, 24, 25, 26, 27, 28, 29, 30, 32
New Motor Vehicle Board v. Orrin W. Fox Co., (Opinion in Chambers per Rehnquist, J., On Application for Stay of Judgment), ... U.S. .....; 54 L.Ed.2d 439; 98 S.Ct. 359	51, 53
North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973)	27, 28
Olson v. Nebraska, 313 U.S. 236 (1941)	30
Orr v. Superior Court, 71 Cal.2d 220 (1969)	65
Orrin W. Fox Co. v. New Motor Vehicle Board, 440 F.Supp. 436 (1977)	24, 28, 29, 30
Paul v. Davis, 424 U.S. 693 (1976)	18, 19, 22, 23, 31, 33
People ex rel. Munsell v. Court of Oyer and Terminer, 101 N.Y. 245 (1886)	57
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	4, 13, 20, 21, 59, 60, 62
Reetz v. Bozanich, 397 U.S. 82 (1970)	66
Rios v. Cozens, 7 Cal.3d 792 (1972); vacated and remanded 410 U.S. 425; reinstated 9 Cal.3d 454	64, 65, 66
Runyon v. McCrary, 427 U.S. 160 (1976)	27
Samuels v. Mackell, 401 U.S. 66 (1971)	47
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935)	27
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)	16, 17
State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436 (1953)	63
State of California v. Superior Court (Veta Co.), 12 Cal. 3d 237 (1974)	21, 54, 55
Trainor v. Hernandez, 431 U.S. 434 (1977)	4, 21, 46, 48, 49, 50, 51, 53, 55, 58
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)	56
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	30

Pages

Wilke & Holzheiser Inc. v. Dept. of Alcoholic Bev. Control, 65 Cal.2d 349 (1966) 63

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) 18, 27, 28, 31, 39

Younger v. Harris, 401 U.S. 37 (1971) .....
.....4, 14, 20, 21, 44, 50, 51, 53, 55, 57, 58

United States Constitution

Fourteenth Amendment 2, 4, 5, 13, 15, 16, 23, 60

Fourteenth Amendment, Section 1 5

United States Statutes

28 U.S.C.:
- Section 1253 4
- Section 1331(a) 2, 13
- Section 1337 ..... 2, 13
- Section 1343(3) 2, 13
- Section 1391(b) 2, 13
- Section 2201 ..... 2, 13
- Section 2281 ..... 2, 13
- Section 2284 ..... 2, 13

California Constitution

Article 1, Section 7 63

Rules

Federal Rules of Civil Procedure, Rule 60(a) 3, 15

California Statutes

Cal. Stats. 1967, ch. 5, §2 32

Cal. Stats. 1973, ch. 996, §1 ..... 5, 42

Cal. Stats. 1977, ch. 880, §1 6

California Codes

Code of Civil Procedure: Pages
- Section 1062a 55
- Section 1094.5 .....20, 45, 54, 57

Government Code:
- Section 11500 et seq. 7, 66

Vehicle Code:
- Section 200 32
- Section 331.1 6
- Section 331.2 6
- Section 507 6
- Section 3060 .....5, 33, 45
- Section 3061 ..... 5, 33
- Section 3062 .....4, 5, 6, 7, 10, 12, 29, 37, 39, 64, 66, 67, 69
- Section 3063 .....5, 8, 37, 42
- Section 3066(a) 5, 7, 40, 66
- Section 3066(b) 5, 7, 40
- Section 3067 .....5, 9, 40, 45, 66
- Section 3068 .....5, 20, 54
- Section 3069 5
- Section 11700 32

Other Authorities

Deering, California Administrative Mandamus (1977 Supp.)
- Section 2.5 65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California,
Appellants,

vs.

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the Central District of California

BRIEF FOR APPELLANTS

OPINION BELOW

The Memorandum of Decision filed by the District Court on September 14, 1977, is reported at 440 F. Supp. 436 and constitutes the Opinion below. The Opinion has been annexed as Exhibit A to the Jurisdictional Statement of the Appellants in Number

77-837 and as Appendix A to the Jurisdictional Statement of the Appellants in Number 77-849. References to the Opinion contained herein are to the reported Memorandum of Decision.

JURISDICTION

This suit, brought by General Motors Corporation and two motor vehicle dealers in Southern California, was commenced on April 13, 1976, by a Complaint for Declaratory Relief and Injunction filed in the United States District Court for the Central District of California. Appendix 1-81. The Complaint, which sought a declaration of the unconstitutionality of the Automobile Franchise Act and an injunction restraining enforcement of the Act's provisions by the New Motor Vehicle Board, the Department of Motor Vehicles, the Department's director, and their respective agents, alleged jurisdiction and venue in the aforementioned Court under 28 U.S.C. §§ 1331(a), 1337, 1343(3), 1391(b) and 2201.

A three-judge court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, denied defendants-appellants' Motion to Dismiss and granted appellees' Motion for Partial Summary Judgment in an Opinion and Judgment filed on September 14, 1977.

The opinion of the Court held that the Act violated the Due Process Clause of the Fourteenth Amendment by depriving plaintiffs of liberty and property without prior notice and opportunity to be heard,

and by failing to provide for a prompt hearing after the initial deprivation. The opinion rejected the Board's contention that the District Court should abstain from exercising its jurisdiction and dismiss the suit. Defendant Board noted its appeal from the judgment filed concurrently with the opinion, on October 13, 1977. Defendants Department of Motor Vehicles and its Director noted their appeals the next day.

Subsequently, on October 18, 1977, a corrected judgment was filed pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, denying appellants' Motion to Dismiss and granting appellees' Motion for Partial Summary Judgment. The corrected judgment declared the relocation and establishment provisions of the Act unconstitutional for the reasons discussed in the Opinion, and enjoined enforcement of those provisions.

Appellants Director and the Department of Motor Vehicles noted their appeal from the corrected judgment on November 17, 1977. Appellant New Motor Vehicle Board noted its appeal on November 21, 1977.

The District Court's Summary Judgment, entered September 15, 1977, and the two notices of appeal therefrom, have been respectively designated Exhibits B, C and D to the Jurisdictional Statement on file herein. The District Court's Partial Summary Judgment, entered October 19, 1977, and the notice of appeal therefrom, have been respectively designated as Exhibits E, F, and G to the Jurisdiction Statement.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Does the prospective ability to grant or undertake a motor vehicle dealership, or to locate or relocate a dealership at a particular location, constitute a liberty or property interest subject to the protection of the Due Process Clause of the Fourteenth Amendment?

2. Assuming the existence of a protected liberty or property interest in appellees affected by the operation of California Vehicle Code section 3062, do the procedures of the California Automobile Franchise Act violate the requirements of due process because they do not provide for a hearing prior to occasioning delay of consummation of appellees' business expectancies?

3. Was the District Court required to abstain from exercise of its jurisdiction under the principles of *Younger v. Harris,* 401 U.S. 37 (1971) and *Huffman v. Pursue,* 420 U.S. 592 (1975), as explicated by this Court's recent decisions in *Juidice v. Vail,* 430 U.S. 327 (1977) and *Trainor v. Hernandez,* 431 U.S. 434 (1977)?

4. Did the doctrine of *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941) require the District Court to abstain from the exercise of its jurisdiction?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment, which provides:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

United States Constitution, Amendment XIV, section 1.

Chapter 996 of the California Statutes of 1973, as amended, is the subject of this suit. The statute, referred to herein as the Automobile Franchise Act or "the Act," is codified in sections 3060 through 3069, inclusive, of the California Vehicle Code, and is reproduced in full as Exhibit H to the Jurisdictional Statement of the Appellants in Number 77-837. Selected provisions of the Act are reproduced in Appendix C to the Jurisdictional Statement of the Appellants in Number 77-849.

Additional provisions of the California Vehicle Code, the California Code of Civil Procedure, and other State statutory provisions, are set out in the margin as reference occurs and relevance requires.

STATEMENT

1. The California Automobile Franchise Act.

The California Automobile Franchise Act provides for state regulation of certain aspects of the relations between new motor vehicle franchisors and their

franchisees[1] which, the state has determined, vitally affect the welfare of the people of California, and establishes the New Motor Vehicle Board for that purpose. The Act imposes specific procedural requirements upon franchisors seeking to establish an additional motor vehicle dealership or relocate an existing dealership within ten miles of an existing dealership for the same line-make.[2] Except under statutorily-specified circumstances[3] the franchisor is required to provide written notification of its intentions to both the New Motor Vehicle Board and each franchisee of that line-make located within the relevant market area. Within fifteen days of receipt of

[1]California Vehicle Code sections 331.1 and 331.2, respectively, define "franchisee" and "franchisor" as follows:

> "§ 331.1. A 'franchisee' is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.
>
> "§ 331.2. A 'franchisor' is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise."

[2]The language of the Act makes the requirements applicable "[i]n the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented . . ."

California Vehicle Code section 507 provides:

> "The 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership."

[3]Effective January 1, 1978, section 3062 was amended to exclude from its operation "any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located." (Cal. Stats. 1977, ch. 880, § 1; see Jurisd. Stmt. Appendix p. 72.) The transactions underlying the present suit do not come within the terms of this subsequent amendment.

the notification any franchisee entitled to notice may file with the Board a protest against the franchisor's intended action. Upon the filing of such a protest, the Board is required to inform the franchisor that the protest has been filed, that a hearing is required to be held pursuant to specific provisions of the Act, and that the franchisor shall not establish or relocate the proposed dealership until the Board has held the required hearing, nor thereafter if the Board should determine that good cause exists for not permitting such dealership. Cal. Veh. Code § 3062.

The Act does not require the Board to provide the franchisor, the franchisee proposed to be established or relocated, or the existing franchisee who files the protest, a hearing prior to informing the franchisor of the Act's requirements.

The Board must, however, order a hearing to be held, and such hearing must be within 60 days from the date of that order. Cal. Veh. Code § 3066(a). The procedures under which the hearing is conducted are prescribed by reference to specific provisions of the California Administrative Procedure Act. (Cal. Gov. Code §§ 11500 et seq.), a separate statute whose provisions are not challenged in this action. In protests against establishment or relocation of motor vehicle dealerships, the Automobile Franchise Act places the burden of proof upon the protesting franchisee to establish the existence of good cause *not* to permit the proposed action of the franchisor. Cal. Veh. Code § 3066(b).

The elements of proof which the protesting franchisee must establish are identified in California Vehicle Code section 3063, which provides:

> "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> "(1) Permanency of the investment.
>
> "(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> "(3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> "(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
>
> "(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

The decision of the Board must be in writing and must contain findings of fact and a determination of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the proposed decision of its hearing officer, as the case

may be. If the Board fails to act within the prescribed time, the proposed action of the franchisor is deemed approved. Cal. Veh. Code § 3067.

2. Material Facts.

a. Establishment of the Fox Dealership.

The Automobile Franchise Act became operative on July 1, 1974. Appendix 208.

On July 15, 1974, appellee General Motors Corporation's Buick Motor Division received an Application for Buick Selling Agreement from Richard L. Fox, president of appellee Orrin W. Fox Co. Deposition of S. G. Gilliatt, July 29, 1976, page 46. In the discussions and communications which followed, General Motors eventually acted favorably upon appellee Fox's application to become a Buick franchisee at 3456 E. Colorado Boulevard, in Pasadena, California. On April 1, 1975, General Motors formally offered appellee Fox the Buick franchise he sought, and Fox accepted the appointment on April 7, 1975. Appendix 138. Concurrent with these events of April, 1975, General Motors for the first time, on April 1, 1975, communicated with Fox concerning the necessity of compliance with the provisions of the Automobile Franchise Act, requiring the franchisor to notify existing franchisees and the New Motor Vehicle Board of its proposed action (Gilliatt deposition 45, Exh. 22; and Fox, on April 7, 1975, confirmed to General Motors the desire to accept the offered appointment "without giving notice to existing Buick dealers located within a 10-mile radius of 3456 E. Colorado

Boulevard." Appendix 210. In this latter communication, Fox assured General Motors that "[w]e recognize the risk potential insofar as the California Dealer Relations Statute (AB-225, as amended) and are willing to accept those risks." *Id.* Fox was thereafter franchised by General Motors as a Buick-Opel dealer, effective May 2, 1975, without notice to existing franchisees in the relevant market area. Appendix 138.

Notwithstanding appellees' failure to comply with the notification requirements of the Act, the enfranchisement of Fox became known and in mid-May, 1975, protests against the establishment of the new dealership were received by the New Motor Vehicle Board from Becherer Buick, Inc. and O'Donnell Buick-Opel, and were filed as Protest Number PR-35-75 and Protest Number PR-36-75 respectively. Affidavit of Sam W. Jennings, August 5, 1976, page 1. On May 29, 1975, the Board notified General Motors of each of the protests and informed it that under the provisions of California Vehicle Code §3062, "you may not establish . . . the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code . . ." Appendix 52, 54.

On July 8, 1975, after General Motors had applied for and been granted a 30-day extension of time to respond to protestants' discovery requests, the Board assigned the dates of August 11 and 12, 1975, for the hearing on the two protests. Jennings Affidavit 2. On August 4, 1975, some three months after the effective date of the Fox dealership establishment, the

Board received a notice from General Motors, dated July 24, 1975, stating that it intended to grant, and had granted, a Buick-Opel franchise to appellee Fox. *Id.*

On August 8, 1975, all parties to the protests against the Fox dealership establishment stipulated that the hearing thereon be continued to September 29 and 30, 1975. These dates were removed from calendar when the protestants obtained a stay order incident to a Sacramento County Superior Court proceeding brought to compel the Board to issue an order for depositions to be taken. Jennings Affidavit 3. After the court issued its decision in that matter, General Motors obtained a temporary restraining order from the Los Angeles County Superior Court prohibiting the taking of the depositions in question. *Id.* Ultimately the hearing on the Becherer and O'Donnell protests was reset for September 15 through 23, 1976.

b. Relocation of the Muller Dealership.

In accordance with a prior understanding with General Motors concerning the advisability of relocation of his Chevrolet dealership, John Muller, president of appellee Muller Chevrolet, negotiated over the one-year period from December 1974 to December 1975 for the acquisition of a dealership site at 475 Foothill Boulevard in La Canada, California. Appendix 146-147. The site was secured, with General Motors' tentative approval of the relocation, in November 1975. Appendix 211.

Final approval was given by General Motors to Muller's relocation at the Foothill Boulevard site on January 16, 1975. Gilliatt deposition 45, Exh. 10. On that same date General Motors notified its existing Chevrolet franchisees and the Board of the proposed relocation as required by California Vehicle Code § 3062. Jennings Affidavit 4. Protests were filed within 15 days by Fred Bell Chevrolet, Inc. and Jack Wall Chevrolet, Inc. These protests were assigned the number PR-88-76 and PR-87-76, respectively (*Id.*) and on February 6, 1976, the Board notified General Motors of the protests and informed it that it was not to relocate the Muller dealership until a hearing had been held. Appendix 78-81.

On February 23, 1976, based upon the estimate of time supplied by General Motors' counsel, the Board tentatively set the hearing on both protests for three days in June, and on April 21, 1976, issued its notice of time and place of hearing. Jennings Affidavit 4. Prior to the scheduled hearing, however, counsel for General Motors requested that the hearing be continued, and on May 17, 1976, a stipulation was filed, continuing the hearing on both protests to August 2 through 6, 1976. Jennings Affidavit 4-5.

3. Proceedings Below.

Proceedings below were commenced by a Complaint for Declaratory Relief and Injunction, filed by appellees on April 13, 1976, alleging jurisdiction and venue in the United States District Court for the Central District of California under 28 United States

Code sections 1331(a), 1337, 1343(3), 1391(b) and 2201. Appellees sought a declaration of the alleged unconstitutionality of the Automobile Franchise Act and an injunction restraining enforcement of the Act's provisions by the New Motor Vehicle Board, the Department of Motor Vehicles, the Department's director, and their respective agents. Among the contentions advanced by plaintiffs-appellees was the allegation that the Act's procedures violated due process under the Fourteenth Amendment to the United States Constitution by "enjoining," through the orders of appellant Board, the enfranchisement of prospective dealers and the relocation of existing dealerships without opportunity for a prompt hearing and without requiring a showing of good cause prior to issuance of the administrative "injunction." Appendix 10, 12, 14-16.

A three-judge court, constituted by the Honorable Walter Ely, Circuit Judge, and the Honorable William P. Gray and the Honorable Robert M. Takasugi, District Judges, was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

On May 7, 1976, defendant-appellant New Motor Vehicle Board filed a Notice of Motion to Dismiss Action, asserting that the District Court was required to abstain from the exercise of jurisdiction over the suit, under *Railroad Comm'n v. Pullman Co., supra,* 372 U.S. 496 (1941). Appendix 89-98. In support of dismissal appellants also asserted that appellees had failed to join as parties to this suit the protestants in the administrative proceedings sought to be enjoined.

Appendix 98-100. Defendant-appellant Department of Motor Vehicles and its Director filed an answer to the complaint on the same date (Appendix 101-103) and joined in appellant Board's motion to dismiss on August 13, 1976. Appendix 230-231. On or about August 4, 1976, the Northern California Motor Car Dealers Association, Inc. and the Motor Car Dealers Association of Southern California, Inc., having been permitted to intervene without opposition, filed a memorandum in support of the motion to dismiss asserting, *inter alia*, that federal abstention was additionally required herein by the doctrine of *Younger v. Harris, supra,* 401 U.S. 37 (1971) and by the principle of conservation of judicial resources. Intervenors' Memorandum in Support of Defendants' Motion to Dismiss, August 4, 1976.

On or about June 8, 1976, appellees filed a Notice of Motion for Partial Summary Judgment asserting in support thereof their contention that the Act deprived them of liberty and property without prior notice and opportunity to be heard and without a prompt hearing following the initial deprivation and therefore violated the Due Process Clause of the Fourteenth Amendment. Appendix 104-105. Appellees also asserted that the Act conflicted with the operation "and underlying economic policy" of the federal antitrust laws and was therefore invalid under the Supremacy Clause of the United States Constitution. Appendix 105.

It having been stipulated that appellants' Motion to Dismiss and appellees' Motion for Partial Summary Judgment might be heard together, a hearing on both motions was ultimately held on September 20, 1976, whereupon both motions were submitted for the decision of the Court.

The District Court denied defendants-appellants' motion to dismiss and granted plaintiffs-appellees' motion for partial summary judgment in an opinion and judgment filed on September 14, 1977.

The opinion of the Court held that the Act violated the Due Process Clause of the Fourteenth Amendment by depriving plaintiffs of liberty and property without prior notice and opportunity to be heard, and by failing to provide for a prompt hearing after the initial deprivation. The opinion rejected the Board's contention that the District Court should abstain from exercising its jurisdiction and dismiss the suit. Defendant Board noted its appeal from the judgment filed concurrently with the opinion, on October 13, 1977. Jurisd. Stmt. Exh. C. Defendants Department of Motor Vehicles and its Director noted their appeals the next day. Jurisd. Stmt. Exh. D.

Following a conference with counsel, the Court on October 18, 1977, filed a corrected judgment pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, denying the Board's motion to dismiss and granting plaintiff-appellees' motion for partial summary judgment. Jurisd. Stmt. Exh. E. Appellants Director and the Department of Motor Vehicles filed an appeal from the corrected judgment on November 17, 1977 (Jurisd. Stmt. Exh. F) and appellant Board

filed its appeal therefrom on November 21, 1977. Jurisd. Stmt. Exh. G.

4. Opinion and Judgment of the District Court.

The District Court found that the dealership establishment and relocation provisions of the California Automobile Franchise Act failed to provide for a hearing prior to the issuance of the New Motor Vehicle Board's notice informing appellee General Motors Corporation, as franchisor, that the Act required General Motors to defer consummation of its commercial ventures with appellees Fox and Muller, pending inquiry by the Board in the protest proceedings commenced against each of those proposed ventures. Believing the hearing requirements of *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) to be applicable (Opinion Below, 440 F. Supp. at 440), the District Court in its Partial Summary Judgment held that the establishment and relocation provisions of the Act deprived appellees of both liberty and property interests without prior notice and opportunity to be heard and without provision for a prompt hearing after the initial deprivation, and thus violated the Due Process Clause of the Fourteenth Amendment. (Jurisd. Stmt. Exh. E, pp. 56-67.)

SUMMARY OF ARGUMENT

A state regulatory statute is not violative of due process merely because it does not require a hearing

to be held prior to imposing delay upon consummation of privately-created business expectancies pending state inquiry in the public interest.

The District Court held that motor vehicle franchisors and their prospective franchisees possess liberty and property interests in the "right" to grant or undertake a motor vehicle dealership and the "right" to relocate their business facilities where they choose. Opinion Below 440 F. Supp. at 440. Without extended inquiry into the nature of these supported rights, the District Court, upon the basis of the requirements of notice and opportunity to be heard announced in *Sniadach v. Family Finance Corp., supra,* 395 U.S. 337 (1969) and *Fuentes v. Shevin, supra,* 407 U.S. 67 (1972), declared that California's Automobile Franchise Act violates due process of law by not providing a hearing before or while requiring franchisors and franchisees to defer consummation of their commercial ventures pending inquiry by the New Motor Vehicle Board, a statewide administrative agency of the State of California.

By invalidating and enjoining enforcement of the motor vehicle dealership establishment and relocation provisions of California's Automobile Franchise Act, the judgment of the District Court has restrained a substantively valid state regulatory program upon the basis of a supposed procedural requirement necessitated neither by the private interests affected nor by the nature of the state's alleged infringement of those interests.

The appellee franchisees and their franchisors were not deprived of either liberty or property interests by the delay imposed by the Act. Whether "the right to engage in any of the common occupations of life" (*Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)) may ever constitute a protected liberty interest for purposes of procedural due process (Opinion Below, 440 F. Supp. at 440) is highly doubtful following this Court's express and longstanding recognition of the state's authority to regulate business and the professions. See *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955). The Court, however, need not determine that question here, because neither the freedom to practice one's occupation as a seller of new motor vehicles nor the freedom to do so in conjunction with any particular franchisor is sought to be regulated by the Act. To the extent that the challenged provisions of the Act relate to the right to engage in an occupation, they constitute only a limitation upon the specific geographical locations from which the prospective dealer may be permitted to operate. Because such limitations have been explicitly upheld as a valid exercise of the police power (*Lee Optical, supra,* 348 U.S. at 491) it is clear that the District Court erred in concluding that the "right" to locate business facilities where one chooses requires a hearing prior to the imposition of such a limitation by the state.

Likewise clear is the fact that the foregoing "rights" do not constitute property interests protected by due process. In *Paul v. Davis,* 424 U.S. 693 (1976)

this Court specifically recognized that both liberty *and* property rights must have their source in either state law or the Bill of Rights to be cognizable for due process purposes. 424 U.S. at 710-711. Appellees have made no assertion that their claimed interests are founded upon any provision of the Bill of Rights. California has never conferred on appellees any right to locate or relocate their business facilities at will and deprives them of no protected interest in limiting their previously unfettered freedom to do so.

Assuming, however, that appellees' interests ascend to the threshold of recognition for due process purposes, the anticipatory and hence tenuous character of those interests must relegate them to a relatively low point on the scale of interests requiring procedural protection. Cf. *Goldberg v. Kelly,* 379 U.S. 254 (1970) (public assistance benefits); *Mathews v. Eldridge,* 424 U.S. 319 (1976) (social security disability benefits); *Dixon v. Love,* 431 U.S. 105 (1977) (driver's license).

By contrast, the interest of the State is substantial and such "deprivation" of appellees' interests as may occur under the Act's procedures cannot be deemed "erroneous." *Dixon v. Love, supra,* 431 U.S. at 114. Moreover, further or additional procedures could not safeguard the interests of the franchisor or its prospective franchisee in the event of an ultimately adverse decision, and their scant utility or probable value to the franchisor would be outweighed by the burden they would create upon the administration of the regulatory scheme.

The decision of the District Court was an unnecessary constitutional adjudication *(Harrison v. N.A.A.C.P.,* 360 U.S. 167, 177 (1959)) which was required to be avoided by the doctrine of *Younger v. Harris, supra,* and the principles of *Railroad Commission v. Pullman Co., supra.* While purporting to recognize the principle of comity underlying the *Younger* doctrine, however, the District Court based its refusal to abstain from deciding this case upon a pre-*Younger* decision of this Court which had rejected *Pullman*-type abstention. Both *Younger*-type abstention and *Pullman* abstention were appropriate and, under this Court's recent decisions, were plainly required to be given application in this case.

The District Court disregarded its duty to refrain from the exercise of its equitable jurisdiction to enjoin pending state proceedings, under *Younger, supra.* At the time federal suit was commenced, there were pending before appellant New Motor Vehicle Board seven protest proceedings to which appellee General Motors was a party. Appendix 8-12. Two of these proceedings involved appellee Orrin W. Fox Co. as a newly-franchised dealer (Appendix 9-10) and two involved appellee Muller as a relocating franchisee. Appendix 11-12. A determination adverse to the interests of appellees in these cases was subject to judicial review under the California "administrative mandamus" procedure authorized under section 1094.5 of the California Code of Civil Procedure. Cal. Veh. Code § 3068. Appellee General Motors was entitled to raise in the state administrative

and judicial proceedings each and every issue subsequently asserted in this suit, and appellees' constitutional claims affecting the jurisdiction of the administrative agency to entertain the proceeding could have been asserted in the judicial review proceeding even if they were never raised before the Board. *State of California v. Superior Court (Veta Co.),* 12 Cal.3d 237, 250-251 (1974). Under these circumstances, where as here the legitimacy of the state's legislative purpose is unquestioned by the Court, the state interest in the uninterrupted administration of its legislative policies through its adjudicatory agencies and its judiciary gives rise to the requirement of *Younger, supra,* that the federal courts withhold equitable relief. *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Juidice v. Vail,* 430 U.S. 327 (1977); *Huffman v. Pursue,* 420 U.S. 592 (1975).

The District Court likewise ignored settled principles of federal abstention under the doctrine of *Railroad Comm'n v. Pullman Co., supra,* in holding facially unconstitutional a state statute which had not been but was likely to be authoritatively construed in litigation currently pending in the state courts. Because exposure of the statute to state judicial scrutiny was likely to result in an interpretation which would either potentially avoid federal adjudication of the tendered claim or at least substantially modify the nature of the federal problem involved, the District Court erred in determining the federal constitutional claim advanced by appellees.

ARGUMENT

I. THE DEALER ESTABLISHMENT AND RELOCATION PROVISIONS OF CALIFORNIA'S AUTOMOBILE FRANCHISE ACT, WHICH DELAY PROPOSED BUSINESS EXPECTANCIES OF FRANCHISORS AND PROSPECTIVE FRANCHISEES PENDING STATE INQUIRY IN THE PUBLIC INTEREST, DO NOT VIOLATE DUE PROCESS OF LAW MERELY BECAUSE THEY DO NOT PROVIDE A HEARING BEFORE SUCH DELAY IS INCURRED.

A. Appellees Possessed No Protected Rights Infringed by Operation of the Act.

1. Appellees Possessed No Liberty Interest in Freedom to Engage in the Occupation of Motor Vehicle Sales. If Such an Interest Exists, the Act Does Not Attempt to Regulate That Freedom.

Though the District Court did not inquire at length into the source of the purported liberty and property interests which it held to be curtailed by the Act, the origin of those interests protected by the Due Process Clause has been recently illuminated in *Paul v. Davis,* 424 U.S. 693 (1976) in which this Court explained:

> "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. *These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,*[5] and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. . . .
>
> * * *
>
> "[5]There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law. See *Monroe v. Pape,* 365 U.S. 167 (1961)."

424 U.S. at 710-711, emphasis added.

Appellees, in their Motion for Partial Summary Judgment, had not asserted that the liberty or property of which they were allegedly deprived had been guaranteed by any provision of the Bill of Rights or recognized and protected by state law.[4] Nor did the District Court attribute appellees' perceived "rights" to either the Bill of Rights or the State.

Instead, in support of its holding that the Act deprived appellees of "liberty," the District Court apparently relied upon language employed by Mr. Justice McReynolds in this Court's decision in *Meyer v. Nebraska,* 262 U.S. 390 (1923), to the effect that the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . ." 262 U.S. at 399. "Certainly," the District Court reasoned, "the right to

---

[4]In their Motion to Dismiss filed in this Court appellees did suggest that the State, through its omission to legislate on the subject of dealership establishments and relocations prior to 1973, had conferred a right on franchisors and franchisees to locate dealerships wherever they choose. (Motion to Dismiss, p. 19, fn. 14.) This suggestion is dealt with *post,* at 32-34.

grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location or another are included within this protection." (440 F. Supp. at 440.)

Whether or not this supposition by the District Court was ever justified under *Meyer,* it has been thoroughly discredited by this Court's subsequent recognition of the freedom of the State to legislate in the field of business regulation, and cannot now support the conclusion that the State is required to provide a hearing for the purpose of protecting such "rights" before insisting on deferral of their exercise pending inquiry on behalf of the public. The error of the District Court's conclusion is readily apparent once the cited language of *Meyer* and the liberty interest purportedly involved here are examined.

The first right identified by the District Court in reliance upon *Meyer, supra,* was the "right" to grant or undertake a motor vehicle dealership. In *Meyer* the Court considered a Nebraska statute which made it a criminal offense to teach the study of foreign languages to children below the level of the eighth grade. In holding that statute, along with similar statutes enacted in Ohio and Iowa *(Bartels v. Iowa,* 262 U.S. 404 (1923)), a denial of due process, the Court stated:

> "The desire of the legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy appreciate. . . . *But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in in time of peace and domestic tranquility has been shown."*

262 U.S. at 402, emphasis added.

"The means adopted," it is clear, were nothing less than what the Court considered to be the extinction of a professional calling:

> "Our concern is with the prohibition approved by the [Nebraska] Supreme Court. *Adams v. Tanner, supra,* [244 U.S. 590 at] p. 594, pointed out that *mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper.* No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. *We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."*

262 U.S. at 403, emphasis and bracketed language added.

In holding unconstitutional what it conceived to be an abolition of an occupation, *Meyer* explicitly relied upon numerous previous decisions of this Court which had similarly struck down state legislation on the ground that it was "arbitrary or without reasonable

relation to some purpose within the competency of the state to effect." 262 U.S. at 400.[5]

The due process approach reflected in the rationale of *Meyer* has of course been rejected by the Court on numerous occasions. As Mr. Justice Black, speaking for the Court in *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949), explained:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia v. New York, supra* [291 U.S. 502] at 523-524, and *West Coast Hotel Co. v. Parrish, supra* [300 U.S. 379] at 392-395, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislature are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

[5]Among the cases relied upon by the Court as precedent for invalidation of state legislation on these grounds were *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) and *Lochner v. New York*, 198 U.S. 45 (1905); as well as *Adams v. Tanner, supra*, all of which, with others spawned by "[t]he *Allgeyer - Lochner - Adair - Coppage* constitutional doctrine" were explicitly rejected by the Court in *Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 534-536 (1949).

355 U.S. at 536-537. See also, *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973); *Williamson v. Lee Optical of Oklahoma, supra*, 348 U.S. 483 (1955); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935).[6]

In 1963, this Court sustained against due process challenge a statute far more destructive of the pursuit of an occupation than even that overturned in *Meyer, supra*, in upholding a Kansas statute prohibiting all persons except lawyers from engaging in the business of debt adjusting. Holding, in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), that the District Court which enjoined enforcement of the statute had erroneously "adopted the philosophy of *Adams v. Tanner* and cases like it, that it is the province of the courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business

[6]Indeed, if *Meyer* is today persuasive of the existence of any particular freedom which the state may not arbitrarily infringe, that freedom is not the supposed right to pursue any particular vocation, but rather "the individual's freedom of choice with respect to certan basic matters of procreation, marriage and family life." (*Kelley v. Johnson*, 425 U.S. 238 (1976).) The clear suggestion of *Kelley* is that *Meyer* principally vindicated, not the freedom of the German instructor to pursue that occupation, but the right of the parents and the child to choose to learn the German language. As Mr. Justice Stewart explained in his opinion for the Court in *Runyon v. McCrary*, 427 U.S. 160 (1976):

> "In *Meyer v. Nebraska*, 262 U.S. 390, the Court held that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes the right 'to acquire useful knowledge, to marry, establish a home and bring up children,' *id.*, at 399, and, concomitantly, the right to send one's children to a private school that offers specialized training—in that case, instruction in the German language. . . ."

427 U.S. at 176.

and by so doing violates due process" (372 U.S. at 729), this Court reaffirmed that "[l]egislative bodies have broad scope to experiment with economic problems" (372 U.S. at 730) and, reiterating the admonition of *Lincoln Union, supra,* confirmed its abandonment of the philosophy of *Adams*, and stated its refusal "to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' . . ." *Ferguson, supra,* 372 U.S. at 731-732, footnote citation to *Lee Optical, supra,* and footnote reference, omitted. See, also, *North Dakota Pharmacy Bd. v. Snyder's Stores, supra,* 414 U.S. at 164-167 (1973).

It is thus quite clear that in identifying an abstract "right . . . to engage in any of the common occupations of life," under *Meyer v. Nebraska, supra,* and in holding freedom to grant or undertake a motor vehicle dealership to be a protected liberty interest comprehended by that right (440 F.Supp. at 440), the District Court necessarily ignored the teaching of numerous post-*Meyer* decisions of this Court which establish that any such "right" is subject to drastic, even prohibitory limitation by the State's police power.

Even if it were assumed that *Meyer* today continues to stand for the existence of some protected right to engage in an occupation, that proposition is not offended by the establishment or relocation provisions of the Act, for if the "right" to grant or undertake a

dealership for General Motors vehicles constitutes the liberty to engage in a lawful occupation, as the District Court declared (Opinion Below, 440 F. Supp. at 440), that liberty is utterly unaffected by the present Act. Nothing in the Act seeks to control or direct General Motors' discretion as to whom it will or will not franchise as a dealer, and likewise, no person is either compelled to enter, or prohibited from entering, into such a business relationship with General Motors or any other franchisor. Moreover, the procedural provisions challenged in this suit have nothing to do with whether or not a particular person may or may not become a motor vehicle dealer under California law. To be sure, California has for years licensed motor vehicle dealers and requires licensure of all who pursue that occupation (see Appendix 162-164) and the authority of the state to do so has neither been challenged by the appellees nor questioned by the District Court. Entry into the occupation through licensure does not depend upon the geographical location of the dealership. Conversely, the applicability of the Act's provisions to a prospective enfranchisement or relocation is in no manner dependent upon the identity or the status of the prospective franchisee as a licensee of the state, but arises by the terms of the Act, "[i]n the event that a franchisor seeks to enter into a franchise establishing . . . or relocating [a] motor vehicle dealership within or into a relevant market area where the same line-make is then represented . . ." Cal. Veh. Code § 3062. Thus, assuming that *Meyer* might require due process protection against refusal or

deprivation of the freedom to pursue a particular occupation, the District Court erred in concluding that such freedom is infringed by the Act.

2. Appellees Had No Liberty or Property Interest in Previously-Unrestrained Freedom to Locate Their Facilities Where They Wished.

The second "liberty interest" discerned by the District Court under *Meyer* was "the right to move one's business facilities from one location to another." Opinion Below, 440 F. Supp. at 440.

If such a "right" exists, *Meyer* lends no support to its recognition, because even if due process might preclude the state from utterly prohibiting the practice of a profession or the pursuit of an occupation, there is *no* constitutional guarantee of freedom from regulation of such profession or occupation under the State's police power. Compare *Adams v. Tanner, supra,* and *Olson v. Nebraska,* 313 U.S. 236 (1941). Only such a freedom, if it existed, could support the District Court's holding that appellees had a right to relocate their facilities wherever they might choose.

Entirely apart from the wholly legitimate adumbration of one's freedom to do business by such prevalent, routine and long-recognized restrictions on place and manner as are presented by municipal zoning law, for example (see *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)), the power of the state to enact restrictions on the geographical placement of one's occupational or professional facilities has been considered and sustained against due process challenge by this Court at least as long ago as the

decision in *Williamson v. Lee Optical of Oklahoma, supra,* 348 U.S. 483, 490-491 (1955). In *Lee Optical, supra,* upholding an Oklahoma statute which in part prohibited the occupancy of retail store space by persons "purporting to do eye examinations or visual care" (348 U.S. at 491), the Court noted that "[g]eographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." 348 U.S. at 491. *Lee Optical* thus belies the existence of any "right" to locate or relocate a business, protected by the Due Process Clause from interference by the State.

In *Paul v. Davis, supra,* 424 U.S. 693 (1976), this Court made it clear that the procedural due process claimant must look either to state law or the provisions of the Bill of Rights to determine whether he is possessed of liberty or property within the meaning of the Due Process Clause. 424 U.S. at 710-77. Appellees have not asserted that they have been deprived of liberty or property protected against interference by the Bill of Rights. The question, then, is whether California law has created or recognized the liberty or property interest for which appellees contend.

As noted *ante,* because the District Court merely assumed that the freedom to grant or undertake a dealership and the freedom to relocate one's facilities

were comprehended by the right to engage in an occupation under *Meyer, supra,* it apparently did not deem it necessary to determine whether California had ever created or recognized either a liberty or a property interest in those particular freedoms. Quite clearly, California had not.

Appellants pointed out to the District Court (Appendix 162-166) and subsequently to this Court (Jurisd. Stmt. p. 5, fn. 1) that California's regulation of the motor vehicle marketing business has grown by increments since 1923. In 1957 the state required dealers to be licensed (Cal. Veh. Code, § 200) and in 1967 this requirement was extended to manufacturers. Cal. Stats. 1967, ch. 5, § 2; Veh. Code, § 11700. The requirements set forth in the Automobile Franchise Act, applicable to establishment and relocation of dealerships, were enacted in 1973.

It is true that the particular aspects of the franchisor-franchisee relationship governed by the Act were unregulated by the State prior to 1973. This circumstance, of course, resulted in no state-conferred grant of any right to establish or relocate dealership wherever the franchisor and franchisee chose. Indeed, if the absence of prior regulation of the geographical placement of such dealerships ipso facto conferred a protectable right on appellees, then no state could ever legislate to fill a prior regulatory void without interfering with "protected liberty or property interests," because in every case the freedom consisting in the prior absence of regulation of the

activity in question would itself disappear when the state eventually acted.[7]

This Court, moreover, has repeatedly recognized that, unlike certain liberty interests,

> "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those benefits . . ."

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *Paul v. Davis, supra,* 424 U.S. 693, 709 (1976).

There is no allegation in appellees' complaint, much less any showing in the record, that the conditions for creation of a property interest, either by rules of the state or those understandings referred to in *Roth, supra,* are present here.[8] Accordingly the limitation expressed in this Court's admonition that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of *interests*

---

[7]The Act's establishment and relocation provisions, by their terms, create no burdens upon continued operation of franchisors and franchisees at existing dealership locations, and thus do not present a case of interference with liberty or property interests of persons established as dealers prior to the effective date of the legislation.

[8]Appellees' complaint pleaded a claim under the rubric "Impairment of Contracts" (Appendix 21-22) which was *not* addressed to the establishment and relocation provisions of the Act affected by the Partial Summary Judgment, but rather to the separate provisions pertaining to terminations of franchises (Cal. Veh. Code §§ 3060, 3061) which the District Court did not consider.

that a person has already acquired in specific benefits," (*Roth, supra,* 408 U.S. at 576, emphasis added) renders the hearing requirements of due process inapplicable here.

B. Assuming That the Claimed Rights of Appellees Rise to the Threshold of Recognized Interests Protected by the Due Process Clause, the Establishment and Relocation Procedures of the Act Satisfy the Requirements of Due Process.

1. Mathews v. Eldridge, 424 U.S. 319 (1976) Identifies the Determinants of What Process Is Due When State Action Constitutes a Deprivation of a Protected Liberty or Property Interest.

Assuming that appellees possessed either a liberty or a property interest in an unrestrained ability to locate or relocate their business facilities wherever they chose, the provisions of the Act which affect those abilities comport with the requirements of procedural due process as identified by this Court.

Once a protected liberty or property interest is implicated, the second part of "the familiar two-stage analysis" requires a determination what procedures constitute due process of law. (*Ingraham v. Wright,* 430 U.S. 651, 672 (1977).) The elements of the inquiry in this second stage were articulated in *Mathews v. Eldridge, supra*:

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . . ."

424 U.S. at 335. See *Dixon v. Love,* 431 U.S. 105, 112 (1977).

2. Appellees' Interest in Prospective Establishment or Relocation of Their Business Ventures at a Particular Location, if Within the Protection of the Due Process Clause, Is Low on the Scale of Interests So Protected.

The private interest affected by the State's action herein, however characterized, consists in the prospective establishment or relocation of appellees' proposed business ventures at a particular geographical location. Assuming that this interest does require the protection of procedural due process, the initial inquiry, for purposes of deciding what process is due, is where that particular private interest ranks in the hierarchy of interests so protected.

In *Mathews v. Eldridge, supra,* this Court pointed out that only in *Goldberg v. Kelly, supra,* had the Court required an evidentiary hearing to precede a temporary deprivation. 424 U.S. at 340. In distinguishing between the interruptions of welfare payments involved in *Goldberg,* which had required a prior evidentiary hearing, and the discontinuation of Social Security disability benefits payments at issue in *Eldridge,* the Court emphasized that *Goldberg* had involved discontinuation of welfare assistance "given to persons on the very margin of subsistence." 424 U.S. at 340. By contrast, the Court explained, "though the hardship imposed upon the erroneously terminated

disability recipient may be significant," there was "less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." (424 U.S. at 342-343.)

Last term, in *Dixon v. Love*, 431 U.S. 105 (1977), the Court considered the requirements of due process applicable to a deprivation of the property interest in a driver's license. Observing that "[u]nlike the social security recipients in *Eldridge,* who could at least obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated" (431 U.S. at 113), the Court, on the basis of all considerations relevant under *Mathews, supra,* upheld an Illinois statute authorizing revocation of a driver's license without a prior hearing upon the occurrence of a third conviction of a moving violation.

By contrast with the driver's license involved in *Dixon*, which this Court had previously recognized as an "important interest" in *Bell v. Burson*, 402 U.S. 535, 539 (1971), appellees' interest in consummation of their business endeavors must be held to be neither so vital nor so essential as to require a hearing where *Dixon* did not.[9] First, at the time the provisions of

[9] *Dixon* held that the driver's license in turn "may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence," citing *Goldberg, supra,* 397 U.S. at 264. *Dixon, supra,* 431 U.S. at 113. See *Eldridge, supra,* 424 U.S. at 343.

the Act initially become applicable by their terms, affected business expectancies will not yet have reached fruition; indeed, if they have, then the franchisor itself has delayed too long in complying with the Act. Just how close to realization the affected plans are when and if delayed depends entirely upon the franchisor, who, under the unconstrued language of California Vehicle Code section 3062, has unfettered discretion to decide when to make its notifications to its franchisees and the Board, and thus activate that section's procedural provisions. Second, since the private contractual basis underlying the affected business expectancies includes and incorporates the Act's provisions affecting the contract's validity, construction, discharge and enforcement (*Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 429-430 (1934)), the contractual interest of the parties is itself limited by the presumptive knowledge of all concerned that that interest is subject to deferral and even to ultimate denial by the State. See Cal. Veh. Code, §§ 3062, 3063.

3. The Temporary Deprivation of Appellees' Interest by Necessary Delay Under the Act Cannot Be "Erroneous", as That Term Has Been Limited by Dixon v. Love, 431 U.S. 105 (1977), and Additional Procedural Safeguards Are Unnecessary.

The interest asserted by appellees, as it exists at the time the Act's provisions commence to apply, is entirely subject to defeasance by subsequent state action, and unless no protest is filed, remains so until final action by the Board. In *Dixon v. Love, supra,* the Court rejected a claim that, because a driver

might *ultimately* establish eligibility for relief from license revocation or suspension, a prior hearing would avoid erroneous deprivation when such an entitlement existed. The Court held that because the statute contemplated relief only after the initial deprivation was authorized, "[a]n initial suspension or revocation, therefore, is not 'erroneous' even if the licensee subsequently qualifies for relief." (431 U.S. at 114, fn. 10.) In like fashion the franchisor under the Act may well ultimately be found to be entitled to establish or relocate its dealership because the burden of demonstrating good cause not to allow the proposed action has not been met; but the fact that the franchisor's plans may ultimately prevail does not render the statutorily-imposed delay "erroneous" any more than the initial deprivation of the protected-interest was rendered "erroneous" by the potential establishment of eligibility for relief from revocation. (*Dixon, supra,* 431 U.S. at 114.)

The reasons underlying the conclusion that a deprivation of the asserted interest cannot be erroneous under these circumstances would terminate the due process inquiry under the view of the Court's action in *Dixon, supra,* expressed in the separate concurring opinion of Mr. Justice Stevens, joined by Mr. Justice Marshall (431 U.S. at 116-117) and of Mr. Justice Brennan, concurring in the result (431 U.S. at 117-118). These Members of the Court were of the opinion that *Dixon* held a temporary deprivation of an existing property interest not to require a prior hearing where specified factual circumstances made

the deprivation mandatory under a valid state regulation. 432 U.S. at 117. The operation of the Act's establishment and relocation provisions falls squarely within the *Dixon* holding, as thus understood. The validity of the substantive exercise of the state's police power upon dealer establishment and relocation is unquestioned by the District Court's opinion and cannot be doubted after *Williamson v. Lee Optical of Oklahoma, supra.* It is, of course, this exercise of the police power which results in the highly tentative character of the interest asserted by appellees. The statutory procedure for effectuation of the regulatory inquiry mechanism, i.e., temporary deferral of consumation of the establishment or relocation, is mandatory under the Act when (1) the franchisor seeks to enter into a franchise establishing or relocating a dealership, (2) the franchisor gives notice of its intentions to the Board and existing franchisees, and (3) a protest is filed with the Board. (Cal. Veh. Code, §3062.) Once these conditions are fulfilled, their existence is indisputable, and therefore a hearing on whether or not the statutory delay is applicable would be of no utility. (Cf. *Dixon,* 431 U.S. at 113-114.) *Dixon's* holding that a state's mandatory deprivation of even a concededly-important, previously-conferred interest (*Bell v. Burson, supra,* 402 U.S. at 539) does not raise a requirement of a prior hearing applies *a fortiori* where the interest involved is prospective rather than extant, is in the nature of an expectancy rather than a right, and is exclusively the creature of privately-held anticipa-

tions rather than a grant, or a rule or explicit understanding, established by the State.

Even if the Act's necessitation of deferral of commercial expectancies is not held to be included within the class of procedures which may be upheld as a mandatory result of a valid regulation, the procedures specified by the Act minimize the likelihood that an erroneous deprivation will result from delay. Unlike the licensee in *Dixon,* the franchisor under the Act need request no hearing to vindicate its interest. The hearing is required by the Act. Cf. *Dixon,* 431 U.S. at 109-110. The franchisor bears no burden of persuasion at the hearing. Cal. Veh. Code, § 3066(b); cf. *Dixon,* 431 U.S. at 110. The hearing itself must be held within 60 days from the date it is noticed (Cal. Veh. Code, § 3066(a)) and, except under specified circumstances, the Board must act upon the case within 30 days after it hears the protest or, if the case has been heard by a hearing officer, within 30 days after the proposed decision is received. Delay beyond the prescribed period results in approval of the franchisor's proposed action. Cal. Veh. Code, § 3067.[10]

Under these circumstances it must be concluded that the probable value of substitute or additional procedures would be slight. For the reasons discussed

[10]In the administrative proceedings involving appellee Muiler, the Board did not act upon the hearing officer's proposed decision within the 30 day period prescribed by Section 3067, and the Muller relocation was accordingly deemed approved. Appellant's Application for Order Staying Judgment, Exhibit E, p. 5.

post, at 42-43, acceleration of the hearing on the merits of a protest to a time prior to occurrence of any delay to the proposed action is particularly undesirable. Moreover, the futility of requiring a preliminary hearing at which the franchisor might initially prevail, only to be later required to surrender its further-advanced plans and the plans of its proposed franchisee, should the Board finally disapprove the proposed action, must be manifest. No justification for such further procedures is discernible.

4. The Interest of the State Is Substantial, and in Light of This Interest, the Burdens Imposed by a Requirement of Substitute or Additional Procedures Cannot Be Justified.

The importance of the State interest embodied in the establishment and relocation provisions of the Act has been made explicit by the legislature of California in the declaration of purpose which attended the Act's passage. The legislature declared:

> "[T]he distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and . . . in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide

adequate and sufficient service to consumers generally." Cal. Stats. 1973, ch. 996, § 1. Appendix 165-166.

The elements of the regulatory concern of the State in the establishment and relocation of franchised motor vehicle dealerships are, moreover, specifically identified by the Act as including the questions of the effect the new dealership will have "on the retail motor vehicle business and the consuming public in the relevant market area" (Cal. Veh. Code, § 3063(2)), "[w]hether it is injurious to the public welfare for an additional franchise to be established" (Cal. Veh. Code, § 3063(3), "[w]hether the purchasees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area . . ." (Cal. Veh. Code § 3063(4) and "[w]hether the establishment of an additional franchise would increase competition and therefore be in the public interest" (Cal. Veh. Code § 3063(5).) Indeed, under California Vehicle Code §3063, these are the issues which the Board must determine in its inquiry into the possible existence of good cause not to permit the proposed action.

Quite obviously, the resolution of these concerns by any form of fact-finding process requires the State to take the time to inquire with some particularity into frequently complex economic circumstances and relationships which will not always lend themselves to easy analysis. Some indication of the time commitment required for the inquiry is supplied by the

fact that in the proceedings upon the Muller relocation, General Motors' counsel estimated a need for three days, later increased to five. See *ante,* at 12.

Imposition of a requirement that this inquiry, perhaps in truncated or abbreviated form, be performed in haste, so as not to delay commercial expectancies when the Act's provisions apply, would obviously impose a burden of substantial dimensions on the State's regulatory machinery while diminishing the deliberate thoroughness which the legislature has determined is necessary to the inquiry. Such a requirement would be particularly unreasonable in light of the fact that the Act's mandatory inhibition upon the proposed action, pending inquiry, operates to maintain the status quo while the State itself takes the time to perform the police function in a responsible manner, and thus serves to minimize the potential economic consequences of a decision adverse to the proposed action.

The importance of the State's interest in the issues which attend establishment and relocation of franchised motor vehicle dealerships is simply too great to permit substitution of any less deliberate or complete inquiry for that supplied by the present adjudicatory procedures; and imposition of additional procedures such as a preliminary hearing held prior to subjecting proposed actions to delay pending full inquiry, would neither serve the purpose of the Act nor ultimately benefit the private interests involved.

The three-pronged due process inquiry required by *Eldridge* thus discloses, first, a private interest

of minimal stature consisting in an expectation of participation in an industry substantively regulated by the State; second, state-created procedures which, though they require deferral of realization of business aspirations pending inquiry, include reasonable safeguards for avoidance of undue delay and for protection of the affected franchisor and potential franchisee against aggravation of economic hardship pending inquiry; and third, an articulated State interest in the regulation of the affected industry, which would be ill served by either substitute procedures requiring the responsible administrative agency to perform its functions in haste, or by additional procedures of questionable benefit to the affected private interest. Under these circumstances, it must be concluded that the Due Process Clause does not require greater procedural safeguards than the Automobile Franchise Act affords.

II. THE DISTRICT COURT WAS REQUIRED TO ABSTAIN FROM THE EXERCISE OF JURISDICTION HEREIN

A. The District Court Was Required by the Doctrine of Younger v. Harris, 401 U.S. 37 (1971) to Withhold Relief and Dismiss the Suit.

1. Abstention Was Required in the Present Case Under This Court's Recently Articulated Rules for the Application of the Younger Doctrine.

The complaint filed in the District Court on April 13, 1976, explicitly identified a total of seven adjudicatory proceedings to which appellee General Motors was a party before the New Motor Vehicle Board.

Two such proceedings involved the proposed relocation of appellee Muller (Appendix 11-12), and two involved the proposed establishment of appellee Fox as a dealer. Appendix 9-10. It was these proceedings, together with all other then pending before the Board, which the District Court was called upon to enjoin by appellee's prayer that appellants be restrained "from taking any action to implement or enforce the provisions of the Automobile Franchise Act." Appendix 25. Had any of these proceedings resulted in a decision adverse to the interests of any appellee, judicial review thereof would have been available through the California prerogative writ procedure for "administrative mandamus"[11] under section 1094.5 of the California Code of Civil Procedure.[12] See Cal. Veh. Code, § 3067.

---

[11]A constitutional issue similar to one raised by the present complaint, but not asserted as a ground for summary judgment and thus never considered by the District Court, was decided by California courts through this very procedure while this case was under submission to the District Court. In *American Motors Sales Corp. v. New Motor Vehicle Board,* 69 Cal.App.3d 983 (decided May 23, 1977) the Court of Appeal for the Third Appellate District affirmed a superior court judgment granting a writ of mandamus, holding that the presence of four new car dealers on the nine-member Board denied due process to manufacturers when the Board adjudicated protests against franchise terminations. Cal. Veh. Code § 3060.

[12]California Code of Civil Procedure section 1094.5 provides in relevant part:

> "(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed

In *Trainor v. Hernandez, supra,* 431 U.S. 434 (1977), Mr. Justice White for the Court observed:

with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

"(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

"(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

"(f) Except as provided in subdivision (g), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration

"Because our federal and state legal systems have overlapping jurisdiction and responsibilities, we have frequently inquired into the proper role of a federal court, in a case pending before it and otherwise within its jurisdiction, when litigation between the same parties and raising the same issues is or apparently soon will be pending in a state court. . . .

"*Younger v. Harris, supra,* and *Samuels v. Mackell,* 401 U.S. 66 (1971), addressed these questions where the already pending state proceeding was a criminal prosecution and the federal plaintiff sought to invalidate the statute under which the state prosecution was brought.

of the time for filing such notice, whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

"(g) . . ."

(Subdivision (g) pertains to stays of the operation of administrative decisions or orders of agencies licensing persons under the Business and Professions Code only.)

> In these circumstances, the Court ruled that the Federal District Court should issue neither a declaratory judgment nor an injunction but should dismiss the case. . . ."

431 U.S. at 440.

Noting that a first justification of this holding lay in the rule that courts of equity particularly should not restrain a criminal prosecution, the Court in *Trainor* then addressed what it ultimately affirmed as "the 'more vital consideration' underlying the *Younger* doctrine" (431 U.S. at 443), explaining:

> "Beyond the accepted rule that equity will ordinarily not enjoin the prosecution of crime, however, the Court voiced a 'more vital consideration.' 401 U.S., at 44, namely, that in a union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts. Relying on cases that declared that courts of equity should give 'scrupulous regard [to] the rightful independence of state governments,' *Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941), the Court held, that in this intergovernmental context, the two classic preconditions for the exercise of equity jurisdiction assumed new dimensions. Although the existence of an adequate remedy at law barring equitable relief normally would be determined by inquiring into the remedies available in the federal rather than in the state courts, *Great Lakes Co. v. Huffman*, 319 U.S. 293, 297 (1943), here the inquiry was to

> be broadened to focus on the remedies available in the pending state proceeding. '"The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection."' *Younger v. Harris*, 401 U.S., at 45, quoting *Fenner v. Boykin*, 271 U.S. 240, 243-244 (1926). Dismissal of the federal suit 'naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.' *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). 'The policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights.' *Kugler v. Helfant*, 421 U.S. 117, 124 (1975.)"

431 U.S. at 441.

The Court in *Trainor* noted that, relying upon the "more vital consideration" of comity, it had since applied the rule of *Younger* to bar issuance of an injunction against a state court suit brought by the state to enforce a nuisance statute in *Huffman v. Pursue, Ltd., supra,* 420 U.S. 592 (1975) and to bar interference with state judicial contempt proceedings, in *Juidice v. Vail, supra,* 430 U.S. 327 (1977). Holding these cases controlling, the Court in *Hernandez* required absention from exercise of the federal injunctive power against the state's recovery of public assistance payments through its judicial attachment procedures, and observed:

"The state action was a suit by the State to recover from appellees welfare payments that allegedly had been fraudulently obtained. The writ of attachment issued as part of that action. . . . Both the suit and the accompanying writ of attachment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs. The state authorities also had the option of vindicating these policies through criminal prosecutions. See *supra*, at 435. Although, as in *Juidice*, the State's interest here is '[p]erhaps . . . not quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding . . . .' 430 U.S., at 335, the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity."

431 U.S. at 444, footnote and footnote reference omitted.

The Court's decision in *Hernandez* reaffirms the teaching of *Huffman, supra,* and *Juidice, supra,* that it is the importance of the State's interest involved in the proceedings sought to be enjoined, which invokes the principles of comity requiring abstention under the *Younger* doctrine. The importance of the State's interest in proceedings before appellant Board consists in California's very ability to regulate the number and geographical placement of new motor vehicle dealerships, in the public interest. See *ante*, at 41-42.

This concern, as Mr. Justice Rehnquist pointed out in his opinion granting a stay of the District Court's judgment herein, "has prompted at least 17 other States to enact statutes which prescribe conditions under which new or additional dealerships may be permitted in the territory of the existing dealership . . ." *New Motor Vehicle Board v. Orrin W. Fox Co.*, ... U.S. .....; 54 L.Ed. 439, 444; 98 S.Ct. 359, 363 (1977). As was brought to the attention of the District Court, at least eight jurisdictions in addition to California have established commissions having authority to make adjudicative inquiry into the existence of the requisite conditions. Appendix 164.

2. Failure to Abstain Under Younger in the Present Case Both Prevents California From Effectuating Substantive Policies and Pretermits Performance of the Function of Providing State Forum for Vindication of Constitutional Objections Thereto.

The District Court expressed no doubt as to the substantiality of the state's interest in the effective regulation of the number and placement of new motor vehicle dealerships. Yet, despite the unquestioned validity of California's interest as a regulator, the District Court, by enjoining ongoing proceedings along with all enforcement of the Act's provisions, deprived the State of the very means to perform the regulatory function. The issuance of the District Court's injunction in the present case is thus paradignatic of the evils which this Court's application of the *Younger* doctrine has sought to avoid. As the Court stated in *Trainor, supra:*

"[T]o restrain a state proceeding that afforded an adequate vehicle for vindicating the federal

plaintiff's constitutional rights 'would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility equally with the federal courts' to safeguard constitutional rights and would 'reflec[t] negatively upon the state court's ability' to do so. *Steffel v. Thompson*, 415 U.S. 452, 460-461, 462 (1974). The State would be prevented not only from 'effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies.' *Huffman v. Pursue, Ltd.*, 420 U.S. at 604."

431 U.S. at 443.

More concretely, the present case substantiates this Court's concern that whether the procedure enjoined is "labeled civil, quasi-criminal, or criminal in nature," federal court interference can be " 'an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding,' . . ." (*Juidice, supra,* 430 U.S. at 336.)Just how great an offense has occurred in the present case was accurately summarized by Mr. Justice Rehnquist in his opinion on appellants' application for stay:

". . . The interest of the State does not necessarily find expression through disapproval of relocation plans, but rather through the act of examining the proposed relocations to make sure that existing dealers are not being impermissibly harmed by the manufacturer and that the move is otherwise in the public interest. This interest is infringed by the very fact that the State is prevented from engaging in investigation and

examination. And the occasion for this review may arise often during the time this injunction is in effect. In an affidavit presented to the District Court, Sam W. Jennings, Executive Secretary of the New Motor Vehicle Board, indicated that in the first 44 days following the issuance of the District Court's injunction, the Board received 99 notices of intent to relocate or establish new dealerships in California. Under the terms of the injunction, all those applicants will be allowed to locate dealerships without undergoing any scrutiny by the State. And assuming the State eventually prevails on the merits and the injunction is lifted, it is not at all clear that the New Motor Vehicle Board will have the authority to examine the propriety of all those relocations or to force those relocated dealerships to stop doing business."

..... U.S. at .....; 54 L.Ed.2d at 445, 98 S.Ct. at 363.

That the District Court's injunction in this case is aimed at the very ability of the State to serve its regulatory purposes underscores the fact that this is precisely the form of interruption which, under *Younger*, can and does "unduly interfere with the legitimate activities of the States," 401 U.S. at 44. See *Juidice, supra,* 430 U.S. at 335-336. Indeed, whereas in *Trainor, supra,* this Court preserved the Illinois attachment procedure from the lower court's injunction largely because it was utilized by the State at its own option to execute its programs (*Id.*, 431 U.S. at 444), in the present case the need for abstention does not depend upon any arguably adventitious interest of the State in the particular

proceeding enjoined. Here the interest of the State is inherent in the creation and the ongoing operation of the challenged procedures themselves. But for that interest, the challenged procedures would not exist; and but for the existence of those procedures the State's interest has no means of vindication.

The District Court's injunction against operation of the Act's procedures was particularly unjustified in light of the fact that the remedies available to appellees in the pending state proceedings included adjudication of every issue tendered for decision by the complaint in this suit. The four adjudicatory proceedings involving the three appellees in this suit provided an administrative and a judicial state forum for appellee's present challenges to the Act. In the event of a Board decision adverse to appellee's interests, the "administrative mandamus" procedure authorized by Code of Civil Procedure section 1094.5 (see *ante* at pp. 45-47) could have been invoked up to 45 days following the Board's order. Cal. Veh. Code § 3068. In that proceeding General Motors would have been entitled to the state superior court's review of all legal issues determined by the Board, as well as a determination of constitutional issues affecting the jurisdiction of the Board, even if such issues had not been raised before the Board in its own proceedings *State of California v. Superior Court (Veta Co.)*, 12 Cal.3d 237, 250-251 (1974). Moreover, General Motors' remedies included an action for declaratory relief in addition to a proceeding under the "administrative mandamus" statute, insofar as General Motors challenged the Act as facially unconstitutional, as it did in the District Court. 12 Cal.3d at 251. Under California law, declaratory relief actions are required to be granted precedence for trial. (Cal. Code of Civil Procedure, § 1062a.) Thus, as the Court observed in *Juidice, supra,* "it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to involve *Younger* abstention." (*Juidice, supra*, 430 U.S. at 337, emphasis by the Court, footnote and footnote reference omitted.)

Application of *Younger* here is, therefore, plainly indicated by exactly those concerns which compelled the result in *Huffman, supra,* in *Juidice, supra,* and in *Trainor, supra* in order to give effect to that "more vital consideration" underlying *Younger.*

3. Neither the Fact That the State Adjudicatory Proceedings Sought to be Enjoined Were Initially Administrative, Nor the Fact That Private Interests Opposed Those of Appellees in Those Proceedings Should Deter Application of Younger to the Present Case.

The appropriateness of abstention under *Younger* is by no means diminished by the fact that the proceedings sought to be enjoined herein were administrative in their origin, rather than original judicial proceedings. Indeed, in *Huffman v. Pursue Ltd., supra,* the Court observed that the standards of restraint which ultimately required abstention in that case grew from recognition of the seriousness of federal judicial interference with state civil functions *per se*, and, by way of example of this recognition, referred specifically to the opinion of Mr. Justice

Holmes in *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926):

> "Writing for the Court, Mr. Justice Holmes cited *Fenner v. Boykin, supra* [271 U.S. 240 (1925)], and emphasized a rule that 'should be very strictly observed,' 272 U.S., at 529, 'that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.' *Id.*, at 527."

420 U.S. at 603.

The Court in *Huffman* explicitly noted that the bill considered by Mr. Justice Holmes sought an injunction not against judicial proceedings, but against state executive officers. 420 U.S. at 603-604. Even if the distinction between judicial and executive functions were otherwise significant for purposes of *Younger* abstention, any such distinction between the adjudicatory authority exercised by an administrative agency such as the Board and the judicial power exercised by the California courts in reviewing agency decisions is functionally immaterial to appellees *"opportunity* to present their federal claims in the state proceeding" (*Juidice, supra,* 430 U.S. at 337)[13] which

[13]As discussed *ante,* the California litigant has available an expedited declaratory relief procedure to challenge a statute claimed to be void on its face and a statutory prerogative writ procedure in which all claims raised before the agency can be relitigated and constitutional claims affecting the agency's jurisdiction may be litigated even if not previously raised. In addition, the statutory review procedure requires the superior court to weigh the evidence either under the standard of *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951) (see *Bixby v. Pierno,* 4 Cal.3d 130, 143 (1971)) or under the independent judgment standard authorized by California Code of Civil Procedure section 1094.5, subdivision (c). Thus the reviewing court in all cases weighs the evidence before the agency, in some cases reweighs the evidence *de novo,* is never foreclosed by agency action consideration of constitutional issues, and is authorized to hear and determine constitutional issues affecting fundamental jurisdiction even if they were never raised before the agency.

the Court has held to be all that is required to invoke *Younger* abstention. *(Id.,* at 337.)

Similarly ineffectual to deter application of *Younger* here is the fact that private interests of existing new motor vehicle dealers may invoke the state proceeding in aid of the regulatory function. Similar circumstances were present and acknowledged in the contempt proceedings in *Juidice, supra,* of which the Court specifically noted, "Contempt in these cases, serves, of course, to vindicate and preserve the private interests of competing litigants, *People ex rel. Munsell v. Court of Oyer and Terminer,* 101 N.Y. 245, 247-259, 4 N.E. 259, 259-261 (1886), *but its purpose is by no means spent upon purely private concerns."* (430 U.S. at 336, fn. 12; emphasis added.) So, here, it is the effectuation of California's substantive policies, not the circumstances from which the policies are served, upon which the purposeful application of *Younger* depends.

4. Neither of the Exceptions to Applicability of the Younger Doctrine Are Present in the Instant Case.

In *Juidice v. Vail,* this Court stated:

> "We noted in *Huffman* that *Younger* principles do not apply, even where otherwise applicable.
>
> 'in those cases where the District Court properly finds that the state proceeding is moti-

> vated by a desire to harass or is conducted in bad faith, or where the challenged statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " ' *Huffman,* 420 U.S., at 611."

430 U.S., at 338.

As in *Juidice, supra,* no facts bringing the present case within one or the other of these "narrow exceptions" *(Huffman, supra,* at 611) were alleged, proved or found. (See *Juidice, supra,* at 338). Indeed, nothing in the complaint (Appendix 1-81), appellees' affidavits in support of their motion for summary judgment (Appendix 143-158) or their argument in support of that motion (Appendix 107-136) suggests that the State *or any other party* involved in the Board's proceedings acted in bad faith or for the purpose of harassment. (Cf. *Juidice, supra,* at 338).

Nor is the present case one in which the trial court has found the State statute "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *(Younger, supra,* at 53-54; see *Trainor, supra,* at 446-447; *Huffman, supra,* at 610.)

Neither of the recognized exceptions to the rule of applicability of *Younger* exists in this case. Accordingly, in light of the importance of the state's interest represented in the proceedings sought to be enjoined, the extent of the interference worked by an

injunction against the Act's procedures, and the availability of the opportunity to vindicate appellees' constitutional claims through the California judiciary, the District Court was required to withhold the exercise of its jurisdiction and dismiss the suit.

B. The District Court Was Required to Decline to Exercise Jurisdiction Under the Principles of Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

1. The Doctrine of Abstention Under Pullman Is Applicable Where, As Here, There Exist for Resolution by the State Courts Issues Which Would Render the Exercise of Federal Jurisdiction Unnecessary or Significantly Modify the Federal Claim.

The District Court erred in refusing to abstain from the exercise of its jurisdiction under the doctrine of *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941).

In *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975), this Court, in an opinion by Mr. Justice Marshall, restated the rule, first announced thirty-seven years ago, which, appellants have consistently argued, should dictate the result of the present suit. The Court stated:

> "In *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941), the Court held that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question. . . ."

420 U.S. at 83.

In applying the *Pullman* doctrine to require abstention and dismissal in a suit challenging the constitutionality of a Texas redistricting plan under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court observed:

> "Among the cases that call most insistenly for absention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. *If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong.* (See *Kusper v. Pontikes,* 414 U.S. 51 (1973); *Lake Carriers' Assn. v. MacMullan, supra; Harman v. Forssenius,* 380 U.S. 528 (1965); *Harrison v. NAACP, supra,* [360 U.S. 167 (1959)].)"

420 U.S. at 84; emphasis and bracketed language added.

Some years previous, in *Harrison v. N.A.A.C.P.,* 360 U.S. 167 (1959), this Court had explicitly recognized the advisability of withholding federal determinations of constitutionality of challenged statutes until they had been "exposed to state construction or limiting interpretation," specifically so that "federal judgment will be based on something that is a complete product of the state, the enactment as phrased by its legislature and as construed by its highest court" 360 U.S. at 178. In vacating the judgment of a three-judge District Court which had declared unconstitutional and enjoined enforcement

of three Virginia statutes, Mr. Justice Harlan for the Court in *Harrison* explained:

> "According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statues in question. . . .
>
> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews v. Rogers,* 284 U.S. 521, 525, as their 'contribution . . . in furthering the harmonious relation between state and federal authority. . . .' *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression that that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e.g., *Railroad Comm'n v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, Inc.,* 316 U.S. 168; *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101; *American Federation of Labor v. Watson,* 327 U.S. 582; *Shipman v. DuPre,* 339 U.S. 321; *Albertson v. Millard,* 345

U.S. 242; *Government & Civic Employees v. Windsor*, 353 U.S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *Chicago v. Fieldcrest Dairies, Inc., supra,* at 172-173."

360 U.S. at 176-177.

The present suit is squarely within the class of cases, identified by the Court in *Harris County, supra,* in which the potential for avoidance of a federal constitutional ruling through a likely state construction of the statute makes the argument for abstention most compelling. As was pointed out to the District Court in support of appellants' Motion to Dismiss, although current pendency of a state action is not a prerequisite to *Pullman*-type abstention, several actions involving the very provisions of the Act held unconstitutional below were in fact pending in the California courts at the time the Motion to Dismiss was heard in the District Court (Appendix 92-96); and as was indicated on application for this Court's stay of the District Court's judgment, in at least two such actions now on appeal to the California Court of Appeal for the Third Appellate District (*Toyota Motor Distributors Inc. etc v. State of California, etc., et al.,* (3d Civil No. 16429) and *Fresno Imports Inc., etc. v. State of California,* (3d Civil No. 16430)), the appellate court's application of state law to substantive issues in those cases may well obviate the exercise of federal jurisdiction altogether,

or at the very least, "materially change the nature of the problem" (*Harrison, supra,* 360 U.S. at 177). See Appellants' Memorandum in Support of Application for Stay, November 18, 1977, pp. 4-5[14]; Jurisd. Stmt. p. 25, fn. 4.

---

[14]Appellants' Memorandum, at the above referenced pages, stated:

"In *Toyota Motor Distributors, Inc., etc. v. State of California, etc., et al.* (3d Civil No. 16430) plaintiffs have appealed from trial court judgments rejecting, *inter alia,* claims that the Act constitutes an invalid exercise of the police power under the California Constitution and an impermissible delegation of legislative authority. Either of these issues could be dispositive on appeal. Although this Court has held that the Due Process Clause of the Fourteenth Amendment provides no basis for assessment of the ultimate wisdom of state legislation (*Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 487-488), the California Constitution's due process clause (Cal. Const. art. 1, § 7, subd. (a)) has provided California courts authority for inquiry into the validity of exercises of the police power. (*State Board of Dry Cleaners v. Thrift-D-Lux Cleaners,* 40 Cal.2d 436, 440-446, 449; *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 235-236; see *Allen v. California Board of Barber Examiners* (1972) 25 Cal.App.3d 1014, 1016-1017.) Nor have the California courts hesitated to inquire, under state law, into delegations of legislative power, such as the Act's, now being challenged for lack of adequate standards and safeguards in the *Toyota Motor Distributors, Inc.* and *Fresno Imports Inc.* appeals. (*Allen, supra,* 25 Cal.App.3d at 1016-1017; *Bayside Timber Co. v. Board of Supervisors* (1970) 20 Cal.App.3d 1, 11-13.) Moreover, while one California appellate court has perceived delegation of legislative power as a non-constitutional issue (*Allen, supra,* 25 Cal.App.3d at 1017), the California Supreme Court has more than once explicitly treated the propriety of delegation as a question of constitutional stature. (*Kugler v. Yocam* (1968) 69 Cal.2d 371, 376; *Wilke & Holzheiser Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 368-369.) Accordingly, the weight of California authority would treat both the issue of police power validity and the issue of delegation as questions to be resolved under the California Constitution, thus lending emphasis 'to the unsettled relationship between the state constitution and a statute' (*Harris County Commissioners Court v. Moore* (1975) 420 U.S. 77, 84) which fortifies the case for abstention. *Id.*"

2. Pending State Litigation May Result in a Construction of the Act Under State Law Which Will Obviate a Ruling on Appellees' Federal Constitutional Claims.

The California Automobile Franchise Act is susceptible to a state court construction which would avoid altogether the necessity of a federal constitutional ruling on the due process claim tendered by appellees. Specifically the California courts may, as a matter of state law, imply a requirement of an evidentiary hearing in connection with issuance of the Board's notification to the franchisor under Vehicle Code section 3062, even though the statutory language itself makes no specific mention of such a hearing.

In *Endler v. Schutzbank,* 68 Cal.2d 162 (1968) the California Supreme Court considered an order, issued by the State Corporations Commissioner to his licensees, which had the effect of barring a particular individual from employment in the finance business. The order had been issued without affording the affected individual an opportunity to be heard in his own defense, and no statute contained an explicit requirement for such a hearing. Nonetheless, concluding that a hearing was indeed required prior to imposition of such a disability, the Court observed that "[t]he commissioner's statutory authority to fashion an appropriate procedure cannot be doubted. (See, e.g., Fin. Code, §§ 22206, 22211, 22400, 22601-22617.)" 68 Cal.2d at 182, fn. 17.

In *Rios v. Cozens,* 7 Cal.3d 792 (1972), vacated and remanded 410 U.S. 425, reaffirmed 9 Cal.3d 454, the California Supreme Court examined a statute requir-

ing that the license of a driver of a vehicle involved in an accident be suspended upon the driver's failure to comply with the state's financial responsibility requirements. The California statute authorized the Department of Motor Vehicles to suspend the license of a driver involved in an accident resulting in bodily injury or property damage in excess of $200 unless he established financial responsibility by one of several methods. A precondition to suspension was a determination by the Department that there was "a reasonable possibility" that a judgment might be recovered against the driver in question. *Orr v. Superior Court,* 71 Cal.2d 220, 226 (1969); overruled in part in *Rios v. Cozens, supra,* 7 Cal.3d at 799. In concluding that the Due Process Clause of the California Constitution required a hearing upon the issue of culpability prior to suspension of the license under the statute, the Court in *Rios, supra,* ordered the Department to provide the driver an opportunity for a hearing. 7 Cal.3d at 799-800.

Judge Warren Deering, a leading commentator on California administrative law, has observed that the California Supreme Court's decisions in *Endler, supra,* and *Rios, supra,* indicate that the California courts will "search the governing statute to find the necessary authority for the agency to provide a hearing." Deering, *California Administrative Mandamus* (1977 Supp.) § 2.5, p. 7. If, as in *Endler* and *Rios,* California courts should identify the existence of interests which make a hearing necessary prior to issuance of the Board's order under California Vehicle Code section

3062, the circumstances recognized in *Endler* and *Rios* permit a California court to "find the necessary authority for the agency to provide a hearing." As discussed *ante,* at 7, several specific provisions of the California Administrative Procedure Act (Cal. Gov. Code §§ 11500 et seq.) provide the statutory blueprint for protest hearing procedure under the Automobile Franchise Act whenever such hearings are authorized. Cal. Veh. Code § 3067. A determination that state law requires a hearing prior to issuance of the Board's notification would, of course, result in complete avoidance of the federal constitutional question involved in the instant decision. *Reetz v. Bozanich,* 397 U.S. 82, 86-87 (1970).

The Act additionally provides both the means and the statutory authority to afford parties an evidentiary hearing promptly *after* issuance of the Board's notification to the franchisor under section 3062, if such a hearing were deemed required under state law. Assuming *arguendo* the correctness of the District Court's construction of section 3066(a), as requiring the New Motor Vehicle Board to order a hearing concurrently with its issuance of notification to the franchisor, if a state court were to hold as a matter of state law that a hearing must occur within a minimal period consistent with the requirements of due notice after the Board's notification to the franchisor is issued, the constitutional question of the necessity of a *prior* evidentiary hearing would be either avoided or substantially altered by, among other things, the short duration of the delay considered in light of the substantiality of the private and public interests being affected. See *Mathews v. Eldridge, supra,* 424 U.S. at 332-335, 347-349. Whether resulting procedures of the Board afforded an opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)) would then be an issue subject to federal court inquiry upon a basis "that is a complete product of the state, the enactment as phrased by its legislature and as construed by its highest court." *Harrison v. N.A.A.C.P.,* 360 U.S. 167, 178 (1959).

3. The Nature of the Problem Presented by Appellees' Federal Claim May Be Substantially Altered by a State Court Construction of the Requirements of the Act.

The language of California Vehicle Code section 3062 requires the franchisor to notify its franchisees "in the event" that it proposes to relocate or establish a dealership (Cal. Veh. Code § 3062) but specifies no point in time when that notification is to be made. As indicated *ante,* at 37, under the unconstrued language of that section it is the franchisor who determines when the procedural provisions of the section will commence to function. The facts of the present case demonstrate that General Motors' enjoyment of unfettered discretion in the timing of its notifications under the unconstrued Act has resulted here in that appellee's issuance of its required notice only on the very day of its final approval of plaintiff Muller's relocation. In the case of the Fox enfranchisement, the subject of compliance with the Act was broached only on the eve of the event itself;

then, appellees Fox and General Motors deliberately chose to ignore the Act's franchisor notice requirements. See *ante,* at 9-10.

Nothing in the Act, of course, requires franchisors to delay the required notice until the very last minute, in such fashion as to maximize injuries resulting from any further delays. Indeed, it is entirely possible that a state court may construe the Act's language as *requiring* the franchisor to issue its notice to its franchisees and the Board at some particular and earlier point in time. In weighing the due process claim advanced by the summary judgment motion, the District Court rejected appellants' argument that an earlier issuance of notice by General Motors in the case of appellee Muller, and *any* form of compliance with the Act in the case of appellee Fox, might have served to render the operation of the Act somewhat less burdensome to all appellees. The District Court, however, apparently never considered the likelihood that a state court might so find upon similar facts,[15] or might authoritatively identify when it is that a franchisor "seeks to enter into a franchise establishing . . . or relocating . . . [a] motor vehicle dealership" within the incoming of section

[15]Even if a state court construction of the Act were to do no more than explicitly recognize that franchisors could time their notice of proposed action to occur at some point prior to the proposed franchisee's first day of business, the determinants of the question whether a hearing is required prior to issuance of the Board's notification would "at least substantially change the nature of the problem" presented in plaintiffs' claim (*Harrison v. N.A.A.C.P., supra,* 360 U.S. at 177) so as to render abstention appropriate. *Bellotti v. Baird,* 428 U.S. 132, 147-148 (1976).

3062, and is thus compelled to supply the required notification.

Thus in holding that ". . . the short answer . . . is that the plaintiffs had a constitutional right to do what they wanted to do, subject only to the restrictions of due process discussed herein", the District Court disregarded the reality that the language of section 3062 is susceptible of construction by the state courts, that a construction which gives concrete meaning to the words, "In the event that a franchisor seeks to enter into a franchise . . ." is possible upon the facts of this very case, and that such a construction would, if not avoid the need for a federal constitutional ruling, at the very least significantly modify the federal claim, and thus render abstention under *Pullman* both appropriate and necessary. *Harris County Commissioners' Court v. Moore,* 420 U.S. 77, 84 (1975).

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the judgment of the District Court must be reversed.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,
ROBERT L. MUKAI,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, California 95814,
Counsel for Appellant New Motor Vehicle Board of the State of California,

STEPHEN J. EGAN,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, California 95814,
Counsel for Appellants Department of Motor Vehicles of the State of California, and Doris V. Alexis, Director thereof.

Date: May 5, 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Supreme Court, U. S.
FILED
JUL 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, ET AL., *Appellants,*
v.
ORRIN W. FOX CO., ET AL., *Appellees.*

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, ET AL., *Appellants,*
v.
ORRIN W. FOX CO., ET AL., *Appellees.*

On Appeal from the United States District Court for the Central District of California

BRIEF FOR APPELLEES

WILLIAM T. COLEMAN, JR.
GIRARD E. BOUDREAU, JR.
JOHN G. NILES
611 West Sixth Street
Los Angeles, California 90017
Attorneys for Appellees Orrin W. Fox Co., Muller Chevrolet, and General Motors Corporation

GEORGE R. BAFFA
301 East Colorado Blvd.
Pasadena, California 91101
Attorney for Appellee Orrin W. Fox Co.

NORIN T. GRANCELL
611 South Shatto Place
Los Angeles, California 90005
Attorney for Appellee Muller Chevrolet

Of Counsel:

O'MELVENY & MYERS
HAHN & HAHN
GRANCELL, KEGEL & TOBIN
A Professional Corporation

OTIS M. SMITH
General Counsel
ROBERT W. CULVER
General Motors Corporation
3044 West Grand Blvd.
Detroit, Michigan 48202

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED 1

COUNTERSTATEMENT OF THE CASE 3

1. Statutory Provisions 5
2. The Practical Impact of the Act 11
3. Proceedings Below 15

SUMMARY OF ARGUMENT 19

ARGUMENT 25

I. The Due Process Clause Forbids Summary Adjudicatory Deprivations of an Individual's Constitutionally Protected Interests Merely upon the Unsupported Application of Competitors 25

A. The Temporary Injunction Provisions of the Act Drastically Affect Strong, Constitutionally Protected "Liberty" and "Property" Interests 26

1. The Automatic Temporary Injunction Provisions Affect Fundamental "Liberty" Interests in Pursuit of an Individual's Occupation 26

2. The Temporary Injunction Provisions Affect an Individual's "Property" Interests, Particularly the State-Created Entitlement To Locate Franchises Freely 31

B. The Act Violates Due Process by Failing To Provide for a Hearing Before the Issuance of Temporary Injunctions That Interfere with Constitutionally Protected Interests 34

Page

II. The Supremacy Clause Also Forbids Issuance of an Automatic Temporary Injunction Merely upon Application of an Individual's Competitors 41

A. Temporary Injunctions Precluding the Entry of New Competition, Obtained with No State Review and Entered Only at the Request of Existing Dealers, Are Contrary to the Federal Antitrust Laws 42

B. The Conflict with the Antitrust Laws Is Not Permitted Under *Parker* v. *Brown* Because the Board Makes No Independent Judgment of the Necessity for the Anticompetitive Action 48

III. The Three-Judge Court Properly Refused To Abstain 54

A. *Pullman* Abstention Is Completely Unwarranted in Light of the Clarity of the Act 56

1. California Courts Would Not Avoid the Necessity for Constitutional Litigation by Requiring a Pre-Injunction Hearing 58

2. A Statutory Requirement of Early Notice, Even If Imposed, Would Not Materially Alter This Case 59

3. The Three-Judge Court Was Not Required To Abstain Pending Resolution of Any State Proceedings 60

B. *Younger* Abstention Would Have Been Completely Inappropriate Even If It Had Been Raised in a Timely Fashion .. 62

CONCLUSION 67

Cases Page

American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975) 46, 47

American Motors Sales Corp. v. Division of Motor Vehicles, 445 F. Supp. 902 (E.D. Va. 1978) 19, 54, 55

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 35

Arnett v. Kennedy, 416 U.S. 134 (1974) 32, 33, 36, 37

Asheville Tobacco Board v. FTC, 263 F.2d 502 (4th Cir. 1959) 50

Bates v. State Bar, 433 U.S. 350 (1977) 20, 23, 48-51

Beal v. Missouri Pacific R., 312 U.S. 45 (1941) 65

Bell v. Burson, 402 U.S. 535 (1971) 32, 35, 36, 37, 39, 40, 41

Bellotti v. Baird, 428 U.S. 132 (1976) 56, 57, 66

Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962) .. 61

Board of Regents v. Roth, 408 U.S. 564 (1972) 27, 28, 29, 32, 34, 35

Buck v. Kuykendall, 267 U.S. 307 (1925) 55

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) ..23, 51

Carey v. Sugar, 425 U.S. 73 (1976) 57

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 38, 39

City of Chicago v. Atchison, T.&S.F.R., 357 U.S. 77 (1958) 56, 58

City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. 1123 (1978) 33

City of Philadelphia v. New Jersey, 46 U.S.L.W. 4801 (U.S. June 23, 1978) 55

Cohens v. Virginia, 6 Wheat. 264 (1821) 56

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 29, 30

Dixon v. Love, 431 U.S. 105 (1977) 32

Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971) 30

Page

Endler v. Schutzbank, 68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968) 58, 59

Eubank v. City of Richmond, 226 U.S. 137 (1912) ... 39

Examining Board v. Otero, 426 U.S. 572 (1976) 59

Exxon Corp. v. Governor of Maryland, 46 U.S.L.W. 4662 (U.S. June 14, 1978) 25, 43

Fuentes v. Shevin, 407 U.S. 67 (1972) 28, 36, 38, 41

General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E. 2d 194, *cert. denied,* 434 U.S. 996 (1977) 19, 54

Gibson v. Berryhill, 411 U.S. 564 (1973) ..38, 51, 61, 63, 64

Goldberg v. Kelly, 397 U.S. 254 (1970) 37, 40

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 20, 23, 50, 51

Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) 30

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 53, 54

Greene v. McElroy, 360 U.S. 474 (1959) 27, 28, 29, 34

H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) .54, 55

Hand v. Board of Examiners, 66 Cal. App. 3d 605, 136 Cal. Rptr. 187 (1st Dist. 1977) 63

Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975) 56, 57, 59

Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) 28

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 62, 63

Ingraham v. Wright, 430 U.S. 651 (1977) 26

Juidice v. Vail, 430 U.S. 327 (1977) 62, 63

Kugler v. Helfant, 421 U.S. 117 (1975) 65

Lake Carriers' Association v. MacMullan, 406 U.S. 498 (1972) 57

Langnes v. Green, 282 U.S. 531 (1931) 3

Page

Lear, Inc. v. Adkins, 395 U.S. 653 (1969) 42

McGautha v. California, 402 U.S. 193 (1971) 39

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 39

Marshall v. Barlow's, Inc., 98 S. Ct. 1816 (1978) 41

Mathews v. Eldridge, 424 U.S. 319 (1976) ...36, 37, 40, 41

Memphis Light, Gas & Water Division v. Craft, 98 S. Ct. 1554 (1978) 32, 39

Meyer v. Nebraska, 262 U.S. 390 (1923) 27, 28

Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924) 53, 55

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 37, 38

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 66

Morrissey v. Brewer, 408 U.S. 471 (1972) 36

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 20, 25, 35, 39, 40

New Motor Vehicle Board v. Orrin W. Fox Co., 98 S. Ct. 359 (1977) (Rehnquist, J., Chambers Opinion) 37

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 37, 40

Ohio Bureau of Employment v. Hodory, 431 U.S. 471 (1977) 61, 66

Orrin W. Fox Co. v. New Motor Vehicle Board, 440 F. Supp. 436 (C.D. Cal. 1977) 6, 8, 12, 13, 15-18, 27, 56, 60

Parker v. Brown, 317 U.S. 341 (1943) ..23, 33, 41, 48-53, 55

Paul v. Davis, 424 U.S. 693 (1976) 28, 32, 33

Perez v. Campbell, 402 U.S. 637 (1971) 53

Perry v. Sindermann, 408 U.S. 593 (1972) 34

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 2, 18, 23, 54, 56-62

Page

Rice v. Alcoholic Beverage Control Appeals Board, Nos. S.F. 23631, 23632 (Cal. May 30, 1978) ..42, 44-47, 52, 53

Rios v. Cozens, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated and remanded*, 410 U.S. 425, *reinstated*, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973) 58, 59

Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951) 23, 42, 43-47

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) 42

Shaw v. Hospital Authority, 507 F.2d 625 (5th Cir. 1975) 30

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 28, 36

Sosna v. Iowa, 419 U.S. 393 (1975) 66

Southern Pacific Transportation Co. v. Public Utilities Commission, 18 Cal. 3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976) 64

Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) 65

State v. Superior Court, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974) 64

State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 254 P.2d 29 (1953) 61

Trainor v. Hernandez, 431 U.S. 434 (1977) 62, 63, 66

Truax v. Raich, 239 U.S. 33 (1915) 34

United States v. General Motors Corp., 384 U.S. 127 (1966) 30

United States v. Robel, 389 U.S. 258 (1967) 27

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 33, 42, 46

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 28

Washington ex. rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 39

Page

White Motor Co. v. United States, 372 U.S. 253 (1963) 42, 47

Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966) 61

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) .. 27

Willner v. Committee on Character, 373 U.S. 96 (1963) 27

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 59

Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971) 51, 52

Wooley v. Maynard, 430 U.S. 705 (1977) 66

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 28, 29, 38

Younger v. Harris, 401 U.S. 37 (1971) ..2, 24, 25, 55, 62-66

Zwickler v. Koota, 389 U.S. 241 (1967) 56

United States Constitution

Commerce Clause, Art. I, § 8, cl. 3 .....3, 39, 53, 54, 55

Fourteenth Amendment .....*passim*

Supremacy Clause, Art. VI, cl. 2 .....*passim*

Federal Statutes and Rules

Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 et seq. 5, 44

Bituminous Coal Conservation Act of 1935, 49 Stat. 991 38

Fed. R. Civ. P. 65 41

Miller-Tydings Act, 50 Stat. 693 .....43, 44

Sherman Antitrust Act, 15 U.S.C. § 1 et seq. ....*passim*

Sup. Ct. R. 40(d)(2) 66

15 U.S.C. § 1391 30

28 U.S.C. § 2281 16

28 U.S.C. § 2284 16

Page

Congressional Materials

House Comm. on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956) 44, 55

State Constitution

California Constitution Art. I, § 13 ..... 59, 61
California Constitution Art. III, § 3.5 63

State Statutes

Cal. Civ. Code § 1790 10
Cal. Civ. Code § 1792 30
Cal. Civ. Code § 1793.2 30
Cal. Civ. Code § 2981 10
Cal. Gov. Code § 11715 9
Cal. Veh. Code § 507 ..... 4, 6
Cal. Veh. Code § 3000 64
Cal. Veh. Code § 3001 64
Cal. Veh. Code § 3050 64
California Automobile Franchise Act, Cal. Veh. Code §§ 3060-3069 ..... *passim*
Cal. Veh. Code § 3060 5
Cal. Veh. Code § 3061 5
Cal. Veh. Code § 3062 ..... *passim*
Cal. Veh. Code § 3063 ..... 8, 33
Cal. Veh. Code § 3064 5
Cal. Veh. Code § 3065 5
Cal. Veh. Code § 3066 ..... 8, 9, 20, 35
Cal. Veh. Code § 3067 ..... 9, 14
Cal. Veh. Code § 3068 8
Cal. Veh. Code § 11700 ..... 10, 35

Page

Cal. Veh. Code § 11703 11
Cal. Veh. Code § 11704 ..... 10, 35
Cal. Veh. Code § 11705 ..... 7, 11, 32
Cal. Veh. Code § 11712 11
Cal. Veh. Code § 11713 ..... 5, 7, 10, 35
Cal. Veh. Code § 40000 7
Ga. Code Ann. § 84-6610 19
Va. Code § 46.1-547 ..... 7, 19

Secondary Sources

Antieau, C., Modern Constitutional Law (1969) 39
Areeda, P. & D. Turner, Antitrust Law (1978) ..42, 44, 50
Davis, K., Administrative Law (1958) 39
U.S. Department of Commerce, 1970 Census of Population, Characteristics of the Population 30
U.S. Department of Commerce, 1970 Census of Population and Housing, Census Tracts 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, ET AL., *Appellants,*

v.

ORRIN W. FOX CO., ET AL., *Appellees.*

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, ET AL., *Appellants,*

v.

ORRIN W. FOX CO., ET AL., *Appellees.*

On Appeal from the United States District Court for the Central District of California

---

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Do the challenged statutory provisions deny procedural due process in violation of the Fourteenth

Amendment by empowering private automobile dealers to invoke the state's injunctive power in adjudicatory proceedings to restrain competitors in the "same line-make" from establishing or relocating franchises in a statutorily defined 314-square-mile "relevant market area," without affording the affected parties any opportunity to be heard, without requiring any showing of good cause, and without requiring any prior or contemporaneous review by a public official?

2. Do the challenged statutory provisions violate the Supremacy Clause by empowering private automobile dealers, without a prior hearing or prior review by any state official, to invoke the state's injunctive power to impose and enforce, for a substantial period of time, horizontal territorial restraints and market allocations forbidden by the federal antitrust laws?

3. Did the court below abuse its discretion under the *Pullman* doctrine when it refused to abstain from adjudicating the foregoing constitutional issues where the court found that the Act was unambiguous and that there was no state litigation pending which might resolve or eliminate the constitutional questions, and where no uncertain issues of state law existed, the resolution of which could potentially harmonize the Act with federal constitutional requirements?

4. Should this Court now order dismissal of appellees' complaint under the *Younger* doctrine because state administrative proceedings were pending when suit was filed, even though those proceedings have long since been terminated favorably to appellees, even though the issue was not raised below, and even

though the constitutional issues could not have been decided in the administrative forum?*

COUNTERSTATEMENT OF THE CASE

The basic issue here is the constitutionality of a California statute that enables existing motor vehicle dealers to use the state's injunctive power in an adjudicatory proceeding to exclude potential competitors from a large geographic market area for an extended period of time, without any state supervision and without any hearing or other safeguard to prevent the abuse of state power by the existing competing dealers. The relevant facts follow.

In the United States, new motor vehicles are marketed primarily through networks of franchised dealerships. Franchised dealers are independent businessmen who purchase motor vehicles, parts, and accessories from a manufacturer, pursuant to the terms of franchise agreements, and resell them to the public. The manufacture, distribution, and resale of automobiles are activities that repeatedly have been held to be in interstate commerce.

States have traditionally regulated motor vehicle dealers and manufacturers in the public interest by

---

* Are the challenged statutory provisions invalid under the Commerce Clause because they impermissibly burden interstate commerce?

The complaint charges that the statute violates the Commerce Clause. (A. 22-23.) The Commerce Clause argument was not included in appellees' Motion for Partial Summary Judgment in the court below, but is submitted here, *see infra* at 53 n.43, in light of recent cases invalidating similar statutes on this ground. This Court, of course, reviews judgments, not judicial reasoning, and may rely on any argument advanced in support of a judgment. *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931).

establishing standards for character, honesty, integrity, and reputation that must be met before a dealer or manufacturer will be licensed to sell new vehicles in the state. California has such a licensing system, the validity of which is *not* challenged in this action. Rather, this action challenges certain *procedural* aspects of an entirely separate California law designed primarily to further the economic self-interest of existing franchised dealers [1] by erecting substantial artificial barriers to the entry of new competition.

The challenged portions of the California Automobile Franchise Act (Act), Cal. Veh. Code §§ 3060-3069, permit existing franchised dealers to obtain, simply by asking for it, a temporary injunction of prolonged duration against the establishment or relocation of a competitive dealership for the "same line-make" anywhere in a statutorily defined 314-square-mile "relevant market area" surrounding the existing dealership.[2] The temporary injunction will remain in effect for months, until the Board decides, after a hearing, whether "good cause" exists to issue a permanent in-

[1] The interests of existing dealers are represented in this case by intervenors Northern California Motor Car Dealers Association and the Motor Car Dealers Association of Southern California, appellants in No. 77-849, who will be referred to as "Dealer Association Appellants." For clarity, appellants in No. 77-837, the New Motor Vehicle Board, the Department of Motor Vehicles, and Doris V. Alexis, will be referred to collectively as "State Appellants." The complaint also named individual members of the New Motor Vehicle Board as defendants (A. 1, 13-14), but they have not appealed.

[2] Cal. Veh. Code § 507 defines the "area within a radius of 10 miles from the site of a potential new dealership" as the "relevant market area." Thus, the Act applies to any proposed establishment or relocation within 10 miles of the place of business of an existing dealer.

junction. Nonetheless, the automatic temporary injunction issues with no prior hearing—under the Act the objecting dealer is not required to justify issuance of the injunction, the potential competitor and his franchisor are not given an opportunity to oppose it, and no state official is required to evaluate its propriety. Moreover, the statute gives this power to exclude potential competitors *only* to existing dealers—the state itself may not become involved *sua sponte*.

1. Statutory Provisions

The Act deals with a number of subjects, but these appeals concern only the procedures applicable to establishment and relocation protests.[3] If an automobile manufacturer and a proposed or existing franchisee agree to establish a new franchised dealership [4]

[3] The pertinent provisions of the Act are reproduced in their current form by Dealer Association Appellants in the Appendix to Brief for Dealer Association Appellants. The Act includes two entirely different kinds of provisions. The establishment and relocation provisions allow one or more existing dealers to interfere in the relationship between a manufacturer and another established or prospective dealer. Other provisions of the Act, not involved here, regulate the contractual relationship between a manufacturer and its franchised dealers concerning terminations and modifications of the franchise agreement and reimbursement practices. These latter provisions permit only the parties to that contractual relationship to invoke the terms of the Act. Cal. Veh. Code §§ 3060-3061, 3064-3065. Many other aspects of the manufacturer-dealer relationship are governed by Cal. Veh. Code §§ 11713.1 and 11713.2. *See also* the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225.

[4] "Establishment" of a new dealership includes the addition of a new franchise to an existing dealership (*e.g.*, the addition of a Buick franchise to a dealership previously enfranchised to sell Chevrolets), as well as the establishment of a completely new dealership. Cal. Veh. Code § 3062(a).

or to relocate an existing one,[5] and if a dealer (or dealers) for the "same line-make" already exists within a radius of 10 miles from the site of the proposed establishment or relocation (the "relevant market area"; Cal. Veh. Code § 507), the provisions of Cal. Veh. Code § 3062(a) are applicable. That section requires written notice of the proposed establishment or relocation to appellant New Motor Vehicle Board (Board) and to all existing dealers for the "same line-make" in the "relevant market area."

After receipt of this notice, any dealer for the "same line-make" (an actual or potential competitor of the proposed dealership) within this 314-square-mile area may file a "protest" against the proposed establishment or relocation with the Board. As the District Court found, this protest need be nothing more than a letter saying simply "I protest." 440 F. Supp. 436, 439 (C.D. Cal. 1977).[6] No showing of any kind is required that the proposed establishment or relocation will have any impact upon the protesting dealer, that it is in any way unfair, or that it will in any way be inimical to the public interest. Nor is any showing required that the protesting dealer has any likelihood of success on the merits.

Upon receipt of such a protest, the Board is required by the Act automatically, and without affording prior notice or opportunity to be heard, to enjoin

[5] "Relocation" of an existing dealership includes any movement of the dealership, except for a move of less than one mile within the same city. Cal. Veh. Code § 3062(b).

[6] The opinion of the District Court is reprinted as Ex. E to Juris. St. of State Appellants and App. A of Juris. St. of Dealer Association Appellants.

the manufacturer and the existing or proposed franchisee from continuing to carry out their contractual arrangements until the Board determines whether "there is good cause for not permitting such dealership."[7] Establishment or relocation of the franchise in violation of the automatic temporary injunction is criminally punishable as a misdemeanor, Cal. Veh. Code §§ 11713.2(*l*), 40000.11, and is a ground for suspension or revocation of the manufacturer's and franchisee's licenses. *Id.* § 11705(a)(3), (a)(10) (A. 56-58).

The Act thus contains no safeguards of any kind to prevent abuse of the temporary injunction provisions by existing dealers, whose sole motivation in filing a protest is often to delay the establishment of a competitive dealership for as long as possible. The Act does not require protests to be made under oath or penalty of perjury, or to contain any allegation or statement of facts supporting the protest. The Act contains no provision requiring a responsible public official to make even the slightest inquiry into the merits of the protest prior to issuance of the Board's injunction, and there is no provision whereby an enjoined party may seek to quash or modify an injunction improvidently issued. Finally, the protestant is not required to post a bond, and the affected parties therefore have no way to recover damages occasioned by protracted delay even if the protest ultimately proves to have been completely groundless.

[7] "When such a protest is filed, the board *shall* inform the franchisor that a timely protest has been filed . . . and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing . . . , nor thereafter, if the board has determined that there is good cause for not permitting such dealership." Cal. Veh. Code § 3062(a) (emphasis added).

Once a protest has been initiated and an injunction has automatically been granted, § 3066(a) of the Act requires the Board to set a hearing on the merits of the protest. Following the hearing, a permanent injunction may issue if, but only if, the Board determines that the protesting dealer has shown "good cause" for it. Cal. Veh. Code §§ 3062(a), 3066(b).[8] This hearing, which may be delayed for 60 days or more,[9] is the first opportunity of any kind for the enjoined manufacturer and dealer[10] to be heard. *Compare id.* § 3066(a) *with id.* § 3062(a). And no matter what is shown when the hearing is finally held, the temporary injunction continues in effect for an indefinite, additional time until the Board makes a final decision.

This indefinite, additional delay beyond the 60 day period occurs because the Board may, and normally does, elect to refer protests to a hearing officer rather than itself conducting a hearing on the merits in the first instance. *Id.* § 3066(a).[11] When such a referral is

[8] "Good cause" is statutorily defined in Cal. Veh. Code § 3063.

[9] The court below held that § 3066(a) requires the hearing to be held within 60 days after issuance of the temporary injunction. 440 F.Supp. at 438. The court also noted, however, that the Board has sometimes calendared hearings substantially after issuing a temporary injunction, *id.*, and substantial time elapses after the hearing before the Board renders a final decision. *See infra* at 8-9. The temporary injunction remains in effect during this entire period. *See infra* at 9.

[10] The new or relocating dealer may present evidence and argument at the hearing. He is not a party, however, and has no right to cross-examine witnesses or to appeal from an adverse decision. Cal. Veh. Code §§ 3066(a), 3068.

[11] Appellees are unaware of any Board proceeding involving the establishment or relocation of a franchised dealership that has *not* been referred to a hearing officer for initial consideration.

made, the Act imposes no time limit within which the hearing officer must submit his proposed decision to the Board. Upon eventually receiving the proposed decision, moreover, the Board may (1) adopt that decision, (2) reach an independent decision on the existing record, (3) take additional evidence, or (4) refer the matter back to the hearing officer for the taking of additional evidence. Cal. Gov. Code § 11517.[12] If the Board takes no action at all within 30 days after receiving the hearing officer's proposed decision, the proposed establishment or relocation is deemed approved. Cal. Veh. Code § 3067. If the Board follows any of the last three courses open to it under Cal. Gov. Code § 11517, however, there is *no* statutory limit on the time it can take to decide a case. Without even a requirement of reasonableness, the Act simply provides that a decision must be rendered "within such period as may be necessitated by Section 11517 of the Government Code." Cal. Veh. Code § 3067. The automatic temporary injunction remains in effect throughout this entire period, even if the hearing officer has concluded that the protest is without merit.

Two particularly significant aspects of this statutory scheme should be emphasized before passing to a discussion of the Act's practical effect. First, state power may be invoked against a proposed establishment or relocation *only* by the existing dealer or dealers who would otherwise be required to compete with the dealership to be established or relocated. Notice to the Board is not required unless a dealer

[12] Cal. Gov. Code § 11517 is made applicable to protest proceedings by Cal. Veh. Code § 3066(a).

davits and documentary exhibits submitted by the parties." 440 F. Supp. at 439. The experiences of appellees Orrin W. Fox Co. (Fox), Muller Chevrolet (Muller), and General Motors Corporation (General Motors) graphically illustrate the unreasonable and unconstitutional burden imposed by the Act on independent franchised dealers and manufacturers who wish to establish or relocate motor vehicle dealerships in California.

Fox and Muller are, and were at all relevant times, duly licensed by California as dealers. (A. 137-38, 143-44). General Motors is, and was at all relevant times, duly licensed as an automobile manufacturer. (A. 152-53.)

For many years Fox has been a franchised dealer for American Motors automobiles and GMC trucks in Pasadena, California. (A. 137-38.) In May 1975, Fox entered into a franchise agreement with General Motors for the establishment of a Buick dealership at Fox's existing place of business in Pasadena and made substantial commitments necessary to engage in that business. (A. 138-41.) Fox was to be a replacement for a Buick dealer who had terminated his franchise over a year earlier, leaving Pasadena without Buick representation for the first time in more than 40 years. Nonetheless, a Buick-Opel dealer in the city of Monrovia and another in the city of San Gabriel jointly filed protests with the Board, and appellees were thereafter automatically enjoined from establishing the dealership.[15]

[15] The charge by State Appellants that "[appellees failed] to comply with the notification requirements" with regard to the Fox franchise is both irrelevant and incorrect. Brief for State Appellants 10. Before entering into the franchise agreement with Fox, General Motors informed the Board by letter that it did not believe it was required to notify Buick-Opel dealers within the "relevant market area" in light of Fox's status as a successor franchisee rather than a new franchisee. The Board responded simply that General Motors "should be guided by the appropriate sections of the California Vehicle Code." Upon receipt of this non-advice, General Motors and Fox entered into the franchise agreement and Fox actually commenced sales. (A. 138-39.) This activity alerted competitors who filed protests. Fox ceased Buick sales immediately upon being advised that protests had been filed, and General Motors sent notices of the proposed enfranchisement of Fox to the Board and to dealers in the "relevant market area" in July 1975.

In July 1975, the Board noticed the protests for hearing. The hearing was initially set for August 1975, but it was delayed, primarily by a series of discovery proceedings commenced by the protesting dealers in state court, and was in fact not held until September 1976. 440 F. Supp. at 439. The Board ultimately found the protests to be without merit. But,

> "under the provisions of the Act, the protestors were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay."

Id. (A. 139-41).

The Muller facts are even more dramatic. In October 1973, Muller had taken over a long-established dealership for Chevrolet automobiles and trucks in an unincorporated area near La Canada, California. (A.

144.) The dealership facilities were antiquated, inadequate, and deteriorating physically. Muller wanted to relocate a short distance away, in La Canada itself, at larger and more modern facilities then occupied by a Volkswagen dealer. (A. 144-46.) After more than a year of complex and time-consuming negotiations, Muller finally concluded an agreement to lease real property and purchase related equipment in December 1975. In January 1976, General Motors gave notice of the proposed relocation. (A. 76, 146-47.) Chevrolet dealers located in the cities of Pasadena and Tujunga filed protests with the Board.

As was the case with the Fox franchise, the protests stated no grounds (A. 76-77), nor did the Board investigate on its own or afford General Motors or Muller an opportunity to be heard. Rather, the Board automatically and summarily enjoined the relocation pending resolution of the protest. (A. 78-81.) Subsequently it scheduled a hearing for June, more than four months after issuance of the injunction. The hearing was again delayed by discovery proceedings initiated by the protesting dealers, and was not held until August 1976. (A. 286.)

The hearing officer found that the protesting dealers had failed to establish "good cause" for a permanent injunction against the relocation, and the Board failed to act on the hearing officer's recommendation. (Grancell Affidavit of Sept. 17, 1976.) Under Cal. Veh. Code § 3067 the proposed relocation was deemed approved when the Board failed to act within 30 days. But, by then:

> "Muller [had been] advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon 'gave up' with respect to this litigation and is starting all over again in his attempt to find a new site for his business."

440 F. Supp. at 439-40 (A. 147-48, 287). While searching for new facilities, Muller has been required to continue his business in the same dilapidated and antiquated facilities, to his competitive disadvantage and to the disadvantage of the consuming public.

The Muller and Fox cases show how the Act encourages and permits existing dealers to delay substantially, or frustrate entirely, the entry of new competitive dealerships. But the expense, inconvenience, and delay already suffered by Fox and Muller are not the end of the story. If either attempts to relocate or add additional franchises in the future, Fox or Muller will again face the continuing threat that a competitor may delay or prevent the proposed action simply by filing an unsubstantiated protest with the Board. Similarly, General Motors will face the threat of such expense, inconvenience, and delay whenever it seeks to establish a new franchise or to cooperate in the relocation of an existing franchise.

3. Proceedings Below

The Fox and Muller incidents, and [illegible] convinced appellees of the unfairness and unconstitutionality of the establishment and relocation protest procedures, and of appellees' inability to avoid irreparable injury from pending and future Board proceedings. On April 13, 1976, appellees filed the instant action seeking declaratory and injunctive relief against State Appellants. (A. 1.)

Appellees asked the District Court to declare the establishment and relocation provisions unconstitutional, on their face and as applied to appellees, and to enjoin continued enforcement of the Act. Appellees sought a declaration, *inter alia,* that the challenged provisions violate the Due Process Clause of the Fourteenth Amendment by permitting private competitors to obtain temporary injunctions automatically—without any prior notice, hearing, or procedural safeguards to prevent abuse. Appellees' complaint also described the conflict between these statutory provisions and the Sherman Act, and the undue burden imposed by the California law on interstate commerce. (A. 14-19, 22-23.)

Dealer Association Appellants subsequently moved to intervene as defendants (Motion of June 25, 1976), asserting that the Act "was passed by the California Legislature, in part to protect the vital economic interests of [their] members." (Crow Affidavit of June 25, 1976, at 1.) Their motion was granted. (Order of July 19, 1976.)

A three-judge panel of the United States District Court for the Central District of California was convened pursuant to 28 U.S.C. §§ 2281 and 2284. (Order of Sept. 7, 1976.)

On June 7, 1976, appellees moved for partial summary judgment on the due process and Supremacy Clause challenges to the Act. (A. 104-06, 109-13.) The court held argument on September 20, 1976.

One year later, on September 14, 1977, the three-judge court issued its decision declaring the challenged portions of the Act unconstitutional and enjoining their implementation and enforcement. 440 F. Supp.

436 (C.D. Cal. 1977). The court unanimously held that the statutory procedures were "in gross violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 440. The District Court's final judgment was entered on October 18, 1977. (Ex. E to Juris. St. of State Appellants.)[18]

The three-judge court noted that under the decisions of this Court, the right to "liberty" protected under the Due Process Clause includes the freedom to "engage in any of the common occupations of life." 440 F. Supp. at 440. While certainly not unlimited or shielded from state regulation, such liberty rights may be restricted or abridged only in conformity with the constitutional guarantees of *procedural* due process. *Id.* Central to such due process guarantees, noted the court, is the opportunity for a meaningful hearing prior to the abridgment of one's protected interests. *Id.*

The challenged protest procedures, the court found, provide the affected parties with no such opportunity to be heard prior to abridgment of their protected interests. Rather, the procedures empower private

---

[18] The complaint, as opposed to the Motion for Partial Summary Judgment, attacked provisions of the Act in addition to the establishment and relocation provisions. (A. 3-5.) These other provisions are not involved in the present appeals because they were not addressed in the Motion for Partial Summary Judgment. Dealer Association Appellants nonetheless assert that other provisions of the Act "would appear to have been gratuitously voided." Brief for Dealer Association Appellants 10. The District Court did initially enter a judgment invalidating the entire Act (Ex. B to Juris. St. of State Appellants), but it corrected its judgment to address only the establishment and relocation provisions. (Ex. E to Juris. St. of State Appellants.) Dealer Association Appellants are thus simply in error.

automobile dealers, on their own and without any governmental determination or inquiry, to cause the state automatically to enjoin others from relocating in new facilities or from establishing new dealerships by the mere filing of a simple protest. The court noted:

> "Little imagination is needed in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probable success, irreparable injury if his protest is not granted, or a bond or any other undertaking."

Id. at 438-39. The unrestricted operation of such delegated power in the hands of private businesses, the court found, "could seriously hamper or even completely destroy" proposed competing operations. *Id.* at 438.

Although the District Court found it unnecessary to reach the Supremacy Clause questions, the court's findings and its description of the Act graphically illustrate the Act's anticompetitive character. The Act as thus characterized is plainly in conflict with the policy and purpose of the federal antitrust laws.

Finally, the three-judge court addressed the *Pullman* abstention issue raised by appellants. Noting that there was no state litigation pending that might "result in an adjudication that would deal with the constitutional problem here presented," and finding that the Act is "clearly unconstitutional, and . . . [without any] ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process," the three-judge court concluded that it need not and, indeed, could not abstain from adjudicating the federal constitutional issues presented. *Id.* at 441-42.

This Court noted probable jurisdiction on February 21, 1978. 98 S. Ct. 1230 (1978).

Subsequent to the decision below, several other courts have considered and invalidated state statutory provisions very similar in effect to those challenged here. *See* Brief for Dealer Association Appellants 11-12. In *General GMC Trucks, Inc.* v. *General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194, *cert. denied,* 434 U.S. 996 (1977), the Supreme Court of Georgia held that Ga. Code Ann. § 84-6610(f)(10) was unconstitutional as an impermissible burden on interstate commerce. The United States District Court for the Eastern District of Virginia reached the same conclusion with respect to Va. Code § 46.1-547(d) in *American Motors Sales Corp.* v. *Division of Motor Vehicles,* 445 F. Supp. 902 (E.D. Va. 1978).

SUMMARY OF ARGUMENT

This is not the case suggested by appellants' briefs. Appellees did *not* contend in the Motion for Partial Summary Judgment and do *not* contend here (1) that establishment or relocation of an automobile franchise at a particular place cannot be permanently enjoined by the state for "good cause" following an adjudicatory hearing, (2) that the hearing required prior to issuance of a temporary injunction must be a plenary evidentiary hearing on the merits, or (3) that a prior hearing is required before business regulations of any type may be imposed by the state.

In the Motion for Partial Summary Judgment, appellees did not contest California's right to regulate establishments and relocations, nor even its right to enjoin an establishment or relocation permanently under § 3062(a) if "good cause" is established at the

§ 3066(a) hearing. Rather, appellees contended merely that the statutory procedures for automatic issuance of a temporary injunction upon the application of a competitor violate the Due Process and Supremacy Clauses. In other words, appellees did not challenge the state's authority to effect *some* regulation of establishments and relocations. They contended only that *when* the state undertakes to do so by creating a forum for the adjudication of disputes between competitors, the state's scheme must satisfy the requirements of the Due Process and Supremacy Clauses. *See, e.g., Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Compare Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *with Bates* v. *State Bar*, 433 U.S. 350 (1977).

Appellees did not seek a plenary evidentiary hearing on the merits before a temporary injunction issues. They sought only the appropriate preliminary hearing guaranteed by the Due Process and Supremacy Clauses, a hearing that will strip existing dealers of the unfettered power to invoke state power to exclude competitors for indeterminate but prolonged periods of time.

Dealer Association Appellants contend that affirmance will "jeopardize or negate thousands of state licensing and business regulation laws." Brief for Dealer Association Appellants 16. That simply is not so, because the Act does not establish a licensing or conventional business regulation scheme. Rather, it establishes an *adjudicatory* scheme for the resolution of privately initiated protests. Appellees' motion was firmly predicated on the adjudicatory nature of the Act, and affirmance will not affect any state laws that do not share its gross constitutional deficiencies.

Stripped of the misconceptions introduced by appellants, the case involves very narrow issues, and the holding below was limited to those issues. The three-judge court held that manufacturers and dealers have constitutionally protected interests in the right to establish and relocate dealerships and that the Act denies due process to manufacturers and dealers by completely failing to provide for a hearing prior to automatic issuance of a temporary injunction at the request of a competitor.

The three-judge court's due process analysis was clearly correct. Under the Act, an existing dealer can, without any state supervision, invoke state power in an adjudicatory proceeding to delay indefinitely the establishment or relocation of a dealership for the "same line-make" anywhere in a 314-square-mile area—an area larger than all except two cities in California. The establishment or relocation of a dealership involves substantial commitments to acquire property and capital financing. Severe financial loss results from delay, and in an extreme case a dealership might be destroyed. The Act's provisions for issuance of a temporary injunction without any prior hearing or other safeguard thus drastically affect the interests of manufacturers and their prospective and existing franchisees in pursuit of their occupations—"liberty" interests fundamental to the "pursuit of happiness" in our society and fully protected by the Fourteenth Amendment.

Manufacturers and their franchisees also have constitutionally protected "property" interests. They derive a state-created entitlement to establish or relocate franchises from their existing licenses or their ability to acquire licenses. Under state law, this entitle-

ment is revocable only for "good cause"—the hallmark of a constitutionally protected "property" interest. Similarly, manufacturers and franchisees have a federally created entitlement to compete in interstate commerce without predatory interference by private individuals. Finally, contractual relationships between dealers and manufacturers with respect to establishments and relocations create constitutionally protected "property" rights.

The most basic principle of due process is that some kind of hearing must precede any adjudicatory deprivation of constitutionally protected interests such as those existing here. Yet, although proposed establishments and relocations in California may be permanently enjoined solely through adjudicatory protest proceedings, and then only for "good cause," the Act provides for no hearing of any kind before the issuance of a temporary injunction of indefinite, but prolonged, duration. The complete absence of any such hearing is doubly offensive because the initiative for the temporary injunction comes *not* from a disinterested government official, but rather from a private, self-interested competitor, and the Board must issue the injunction automatically, with no questions asked, whenever such an existing dealer chooses to initiate proceedings. The absence of any prior hearing whatsoever in these circumstances is patently violative of due process, and the three-judge court correctly required that *some* appropriate procedure, to be designed by the state, be afforded.

The issues raised by appellees' Supremacy Clause claims are equally simple. The challenged provisions of the Act conflict with the federal antitrust laws, which impose a per se prohibition against horizontal market allocations, because the automatic temporary

injunction provisions give an existing dealer unfettered power to exclude horizontal competitors for the "same line-make" from a very significant geographical area for prolonged periods. The Act thus must fall under the Supremacy Clause. *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

Appellants' only defense is *Parker* v. *Brown*, 317 U.S. 341 (1943), but *Parker* is not applicable here. The *Parker* exemption applies to adjudicatory proceedings, if at all, only when a state body makes an independent determination that anticompetitive conduct must be permitted under the close supervision of the state. *Parker* does not apply when the state statute, as here, invests private competitors with totally unsupervised discretion to invoke state power in order to accomplish predatory anticompetitive objectives. *Compare Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *and Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), *with Bates* v. *State Bar*, 433 U.S. 350 (1977). If the narrow exemption articulated in *Parker* is applicable at all, its requirements can be met with respect to issuance of a temporary injunction only if the Board affords manufacturers and franchisees some kind of prior hearing at which the Board or some other state official preliminarily evaluates the merits of the protest so that it is the Board, not the private competitor, which imposes an anticompetitive restraint.

Finally, the three-judge court properly refused to abstain. This Court's decision in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), does not require abstention, because the Act clearly and specifically requires that the Board issue a temporary injunction automatically, without any prior hearing, upon the

filing of a protest. And the three judges below, all familiar with California law, expressly found that the Act was unambiguous and not susceptible to a state-law construction that would avoid the necessity for constitutional adjudication. The inappropriateness of abstention is underlined by appellants' complete failure here or below to *advocate* any saving state construction or to explain how the constitutional question might be avoided through state litigation.

Younger v. *Harris*, 401 U.S. 37 (1971), is equally inapplicable. No contention was made below by any party that the three-judge court should dismiss the suit in light of the then pending Fox and Muller administrative proceedings. In any event, the court did not restrain the Board's consideration of those protests, and they had been resolved favorably to appellees before the injunction herein was issued. Principles of comity hardly require dismissal now, when the policies underlying *Younger* were not previously frustrated and could not now be retroactively served. Moreover, dismissal would not have been proper even if the contention had been timely raised. Under California law appellees could not have effectively raised the constitutional issues in the Muller or Fox proceeding. And state court review of the administrative proceeding is not an adequate remedy. Because appellees prevailed on the merits before the Board, their constitutional challenges could not be raised in court. If appellees had lost before the Board on the merits, the irreparable injury caused by the temporary injunction could not have been remedied by state court review. Finally, regardless of any of the other reasons why *Younger* does not apply here, the multiplicity of protest proceedings and the financial hardship and irreparable loss attendant upon the issuance of temporary injunctions bring this case within the "exceptional circumstances" exception to *Younger*.

ARGUMENT

I. THE DUE PROCESS CLAUSE FORBIDS SUMMARY ADJUDICATORY DEPRIVATIONS OF AN INDIVIDUAL'S CONSTITUTIONALLY PROTECTED INTERESTS MERELY UPON THE UNSUPPORTED APPLICATION OF COMPETITORS.

The Act establishes an adjudicatory system, predicated upon "good cause," to resolve disputes between existing individual dealers and other individuals who propose to establish new dealerships for the "same line-make" or relocate such existing dealerships. This adjudicatory process can be initiated only by existing, self-interested dealers who are or would be actual or potential competitors of the individuals whose rights will be affected by a temporary or permanent injunction. As the Court has noted, the basic, and unquestionable, principle of due process is that the state must afford *some* kind of hearing before it interferes by adjudication with the conduct of a private individual at the request of another private individual. *See, e.g., Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).[17]

[17] These requirements of procedural due process are, of course, entirely separate from the requirements of substantive due process considered by the Court in such cases as *Exxon Corp.* v. *Governor of Maryland*, 46 U.S.L.W. 4662 (June 14, 1978). When economic legislation is challenged on substantive due process grounds, the contention is that a state may not regulate a certain subject at all or that the substantive provisions are unfair and arbitrary, not that the state must afford appropriate procedures if it chooses to regulate that subject only through adjudicatory proceedings initiated by private competitors. As noted already, appellees' contentions here are limited to the latter concern. *See supra* at 19-20.

The Act transgresses this basic requirement. In accordance with "the familiar two stage analysis" identified in *Ingraham* v. *Wright,* 430 U.S. 651, 672 (1977), Section A hereof first demonstrates that the Act affects vitally important "liberty" and "property" interests. Section B then turns to an assessment of the patent constitutional inadequacy of the Act's procedures.

A. The Temporary Injunction Provisions of the Act Drastically Affect Strong, Constitutionally Protected "Liberty" and "Property" Interests.

1. THE AUTOMATIC TEMPORARY INJUNCTION PROVISIONS AFFECT FUNDAMENTAL "LIBERTY" INTERESTS IN PURSUIT OF AN INDIVIDUAL'S OCCUPATION.

The three-judge court correctly held that automobile dealers and manufacturers have "liberty" interests in their establishment and relocation decisions:

> "As the Supreme Court has said, the right to the liberty proclaimed by [the Due Process Clause of the Fourteenth Amendment] '. . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' *Meyer* v. *Nebraska,* 262 U.S. 390, 399 . . . (1923). Certainly, the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another are included within this protection. Of course, the right to do these things is not unlimited. Legitimate conflicting interests of other individuals and of the public as a whole often require that restrictions be imposed. The Fourteenth Amendment requires only that such restrictions be administered in accordance with the procedural safeguards that have been established over the years as constituting due process of law."

440 F. Supp. at 440.

The principal basis of State Appellants' contrary argument is that after this Court's decision in *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955), there is no longer any "liberty" interest in "the right of the individual . . . to engage in any of the common occupations of life." *See* Brief for State Appellants 22-24. This fallacious argument, however, requires no extended discussion, for the Court has continued to recognize the right identified in *Meyer* since *Williamson.* In *Greene* v. *McElroy,* 360 U.S. 474, 492 (1959), for example, the Court said:

> "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth [or Fourteenth] Amendment, *Dent* v. *West Virginia,* 129 U.S. 114; *Schware* v. *Board of Bar Examiners,* 353 U.S. 323; *Peters* v. *Hobby,* 349 U.S. 331, 352 (concurring opinion); *cf. Slochower* v. *Board of Education,* 350 U.S. 551; *Truax* v. *Raich,* 239 U.S. 33, 41; *Allgeyer* v. *Louisiana,* 165 U.S. 578, 589-90; *Powell* v. *Pennsylvania,* 127 U.S. 678, 684 . . . ."

See Board of Regents v. *Roth,* 408 U.S. 564, 572 (1972); *United States* v. *Robel,* 389 U.S. 258 (1967); *Willner* v. *Committee on Character,* 373 U.S. 96, 102 (1963).[18]

---

[18] It is also argued that there is no "liberty" interest in pursuit of an occupation because such an interest is not specifically guaranteed by the Bill of Rights. Brief for State Appellants 22-23; Brief

The Court has also always recognized the fundamental importance of this right. Ours is still essentially a free enterprise economy, in which each individual's own efforts contribute importantly to the "pursuit of happiness." *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *Fuentes* v. *Shevin*, 407 U.S. 67, 90 (1972). The rights to labor and to hold the fruits of labor securely therefore have always been afforded substantial constitutional protection. *See, e.g., Greene* v. *McElroy*, 360 U.S. 474, 492 (1959) and cited cases; *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972).[19] In particular, those rights must not be subjected to the arbitrary whims of competitors, as is allowed by the Act's temporary injunction provisions:

> "[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo v. *Hopkins*, 118 U.S. 356, 370 (1886); *see Fuentes* v. *Shevin*, 407 U.S. 67, 93 (1972). *See also Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

---

for Dealer Association Appellants 14, *citing Paul* v. *Davis*, 424 U.S. 693, 710-11 & n.5 (1976). *Paul* did not consider this question and could hardly have been intended to disapprove so casually the decisions cited in the preceding text. Moreover, it is clear from subsequent cases that a protected "liberty" interest can arise from the "'Nation's history and tradition.'" *E.g., Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). It is precisely in such sources that *Meyer* and other decisions have found the "liberty" interest in pursuit of an occupation.

[19] The strength of the individual's interest in liberty of enterprise is fully reflected in the federal antitrust laws. *See infra* at 33-34, 41-53.

State Appellants therefore can only hope to prevail by arguing that the interests of dealers in establishing or relocating dealerships at a particular site and the interests of manufacturers in such activities, each for any number of valid business reasons,[20] are outside the unquestioned "liberty" interest in pursuit of an occupation. *See* Brief for State Appellants 30. This simply cannot be true. If the interest of which an individual is deprived is not "liberty" or "property," due process is not required before either a temporary or a permanent deprivation. Thus, if establishment and relocation decisions were to be deemed completely outside the protection of the Fourteenth Amendment, the Act could also require issuance of a permanent injunction on the naked and capricious protest of a competing dealer—an unthinkable result. *See, e.g., Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), *quoted supra* at 28. *See also infra* at 38-39.

State Appellants attempt to support their position by arguing that the "liberty" interest in pursuit of an occupation is not implicated unless an individual is completely precluded from pursuing his occupation through denial of a license. Brief for State Appellants 28-30. This Court, however, has announced a far different test. In *Board of Regents* v. *Roth*, 408 U.S. 564, 574 (1972), the Court noted that this "liberty" interest is implicated whenever the state "foreclose[s] a range of opportunities." And the Court has found an individual's interest in a "specific job" in private enterprise and in admittance to practice accountancy before a specific federal tribunal to be constitutionally protected. *See Greene* v. *McElroy*, 360 U.S. 474, 492

---

[20] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54-55 & n.23 (1977). *See infra* at 30 n.21.

(1959); *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117, 123 (1926). Several lower courts have held that a doctor's "liberty" interest includes his interest in admittance to staff privileges at a particular public hospital. *Shaw* v. *Hospital Authority,* 507 F.2d 625 (5th Cir. 1975); *Don* v. *Okmulgee Memorial Hospital,* 443 F.2d 234 (10th Cir. 1971).

At stake in *Greene, Goldsmith, Shaw,* and *Don* was the individual's interest in pursuing his occupation at a particular, limited place. These decisions thus establish that dealers and manufacturers have a "liberty" interest in establishing or relocating dealerships at the sites of their choosing, as the three-judge court held.[21] Yet the temporary injunction provisions give each existing dealer unfettered dominion over a "relevant market area" with an area of 314 square miles, sufficient to allow an existing dealer in the heart of all but two cities in California[22] to cause any proposed

[21] The right to market automobiles through sufficient numbers of appropriately located franchised dealers is important to a manufacturer's efforts to achieve marketing efficiencies and to meet its responsibilities to consumers, including responsibilities for product quality and product safety imposed by both federal and state law. *See Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 54-55 & n.23 (1977); Record 316-21, *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966); *cf.* 15 U.S.C. § 1391 *et seq.;* Cal. Civ. Code § 1792 *et seq.,* § 1793.2.

[22] According to the 1970 census, only two cities in California have an area of more than 314 square miles: San Diego (316.9) and Los Angeles (463.7). U.S. Dep't of Commerce, 1970 Census of Population, Characteristics of the Population, vol. I, pt. A, § 1, Table 31. Assuming that any other city in California is roughly circular and that an existing dealer has a central location, the Act would apply to any "establishment" or "relocation" of a "same line-make" franchise within the city because any proposed franchise would be within 10 miles of a centrally located dealer.

A "relevant market area" can easily contain hundreds of thousands of consumers, as illustrated by the Fox case. The "relevant market area" surrounding the Fox dealership includes a population of approximately 1,370,000, even though much of the "relevant market area" is included within the Angeles National Forest and thus is virtually uninhabited. This figure was derived by totalling the 1970 population in census tracts within 10 miles of Fox's place of business in Census Tract 4631.02. *See* U.S. Dep't of Commerce, 1970 Census of Population and Housing, Census Tracts, Los Angeles-Long Beach, Calif. SMSA, Vol. 1 (map and tables).

establishment or relocation in his city to be enjoined temporarily, without valid cause, no matter how responsibly the manufacturer and prospective dealer have acted and no matter how arbitrarily the injunctive power is exercised by a protesting dealer.[23] Clearly the Act interferes with the "liberty" interest in establishing or locating dealerships and "foreclose[s] a range of opportunities."

2. THE TEMPORARY INJUNCTION PROVISIONS AFFECT AN INDIVIDUAL'S "PROPERTY" INTERESTS, PARTICULARLY THE STATE-CREATED ENTITLEMENT TO LOCATE FRANCHISES FREELY.

The three-judge court also held that the challenged provisions deprive manufacturers and franchisees of "property" without due process. (Ex. E to Juris. St. of State Appellants.) The temporary injunction provisions affect three separate property interests: that arising from state licenses, that arising from the federal antitrust laws, and that arising from contractual arrangements between dealers and manufacturers.

[23] In some circumstances the Act would completely preclude a dealer from pursuing his occupation during the delay. For example, if a fire or condemnation forced a dealer to relocate, he would be completely unable to do business until final resolution of any protest instigated by a competitor. Moreover, a dealer's financial or other arrangements may be so disrupted by a protest as to cause him to go out of business.

A dealer or manufacturer must be licensed before conducting business in California. *See supra* at 10. When a license applicant meets the licensing criteria, which are completely separate from the Act, *see supra* at 10-11, he is entitled to be licensed, and his license is revocable only for cause. Cal. Veh. Code §§ 11705, 11705.2, 11705.4. These state licenses create a right to establish or locate franchises anywhere, *see supra* at 11, which can be permanently "altered or extinguished," *Paul* v. *Davis,* 424 U.S. 693, 711 (1976), only if a protesting dealer shows "good cause." *See supra* at 8. Because a license may be denied or an establishment or relocation prevented only for "cause," these state-created rights are within the "property" protected by the Due Process Clause. As the Court stated in *Memphis Light, Gas & Water Division* v. *Craft,* 98 S. Ct. 1554, 1561 (1978) (footnote omitted), "Because [a Tennessee utility] may terminate service only 'for cause,' [its customers] assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." *See Dixon* v. *Love,* 431 U.S. 105 (1977); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Bell* v. *Burson,* 402 U.S. 535 (1971).

Dealer Association Appellants suggest that this "property" interest was terminated by the Act, and that establishment or relocation decisions now involve mere "business desires or expectations of future benefits." Brief for Dealer Association Appellants 12. In fact, however, as already noted, the Act does not affect licensing and specifies that an establishment or relocation may be permanently enjoined only if it is finally determined that there is "good cause for not permitting such dealership." Cal. Veh. Code §§ 3062

(a), 3063. Clearly, the Act left the state-created "property" interest intact, simply subjecting it to "alter[ation] or extinguish[ment]," and then only for "good cause." *Paul* v. *Davis,* 424 U.S. 693, 711 (1976)."[24] Thus, state law continues to create a constitutionally protected "property" interest.

Establishment and relocation decisions also involve a federally created "property" interest. Under the federal antitrust laws, there is a "freedom guaranteed each and every business no matter how small, . . . to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 610 (1972); *see City of Lafayette* v. *Louisiana Power & Light Co.,* 98 S. Ct. 1123, 1129 (1978). This statutorily created federal right may be abridged by state action in an adjudicatory or regulatory proceeding initiated by a competitor only if the requirements of *Parker* v. *Brown,* 317 U.S. 341 (1943), are met. As shown more fully in Part II, *infra,* the *Parker* exemption cannot be claimed when the state, upon the request of a competitor, automatically enforces discretionary anticompetitive acts taken by private individuals without independently inquiring whether in-

---

[24] The Act attempts to authorize extinguishment of this "property" interest without constitutionally sufficient procedures, but this is irrelevant to the threshold question whether the entitlement exists. For once state law creates an entitlement, constitutionally adequate procedures must be provided before deprivation of the entitlement. *Compare Arnett* v. *Kennedy,* 416 U.S. 134, 164, 167 (Powell, J., concurring in part & concurring in the result), *id.* at 171, 177-79 (White, J., concurring in part & dissenting in part), *id.* at 206, 209-11 (Marshall, J., dissenting), *with id.* at 134, 151-54 (plurality opinion). The three separate opinions commanded the votes of six Justices.

terference with the freedom to compete is justified by "cause." Thus, federal law, like state law, creates a constitutionally protected "property" interest. *See* the cases cited in the preceding paragraph.

Finally, establishment and relocation decisions involve a contractual relationship under which dealer and manufacturer agree that a franchise shall be established or relocated at a particular place. The contracting parties are entitled to enjoy the fruits of their agreement unless there is "good cause" to prevent the proposed establishment or relocation permanently. Such contractual relationships create constitutionally protected "property." *See, e.g, Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Truax* v. *Raich,* 239 U.S. 33, 38 (1915); *cf. Greene* v. *McElroy,* 360 U.S. 474, 492 (1959). The state cannot, in an adjudicatory proceeding, deprive individuals of those interests without providing due process. *E.g., Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972).[25]

B. The Act Violates Due Process by Failing To Provide for a Hearing Before the Issuance of Temporary Injunctions That Interfere with Constitutionally Protected Interests.

Although it might have chosen otherwise, the state regulates establishments and relocations solely through

[25] State Appellants apparently contend that no protected "property" interest could arise by contract because the contracts "[include] and [incorporate] the Act's provisions affecting the contract's validity, construction, discharge and enforcement." Brief for State Appellants 37. If this were true, a government employee dischargeable only for "cause" could be discharged without a prior hearing, pursuant to a statute so providing, if his employment contract were entered after enactment of the statute. The Court has held to the contrary. *See supra* at 33 n.24.

adjudications initiated by self-interested private dealers. The constitutionality of the Act is to be evaluated on the basis of what the state has actually enacted, not on the basis of what it could have enacted. *E.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 515 (1964). Having chosen to establish such a system, the state is subject to the long-established requirement that some kind of hearing must precede any adjudicatory deprivation of interests protected by the Due Process Clause.

> "Before a person is deprived of a protected interest [by adjudication], he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"[26]

Board of Regents v. *Roth,* 408 U.S. 564, 570 n.7 (1972); *see Bell* v. *Burson,* 402 U.S. 535, 541 (1971); *Mullane*

[26] Appellants do not, and could not, contend that protests filed by an existing dealer present an "extraordinary situation" justifying summary procedures. First, mere operation by the proposed dealer does not routinely threaten the public interest. The most dramatic proof of this is that the Board cannot interfere with a proposed establishment or relocation *sua sponte* but merely adjudicates any protest filed by a competitor. Moreover, no franchisor or proposed franchisee can do business in California unless he is licensed, Cal. Veh. Code § 11700, and the Department is fully authorized to inquire into an applicant's "character, honesty, integrity, and reputation" before issuing a license. *Id.* § 11704(a).

Second, the establishment and relocation of franchised dealerships is a normal competitive practice beneficial to the consuming public, the new dealers, and the manufacturer. *See infra* at 44 n.36. The Act recognizes this by assigning the burden of proof on "good cause" to the protestant. Cal. Veh. Code § 3066(b). In addition, Cal. Veh. Code §§ 11713.1 and 11713.2 proscribe manufacturer attempts to treat existing dealers unfairly. *See especially* Cal. Veh. Code § 11713.2(a), (i), (o), (p).

v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This principle applies to temporary, as well as final, deprivations of protected interests. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471, 485-87 (1972).[27]

The Act fails to meet this standard, because the affected parties receive no hearing of any kind before they are deprived of the constitutionally protected interests described in Section A by an automatic temporary injunction. *See supra* at 6-7. Moreover, the Act totally fails to provide *any* of the procedural safeguards normally associated with deprivations of constitutionally protected rights in adjudicatory proceedings. The Act does not require that the franchisor and potential franchisee be notified of the grounds for the protest and allowed to contest them, orally or in writing, *prior* to issuance of the temporary injunction.[28] It does not require that the Board issue a tem-

[27] Appellees' motion and the three-judge court's decision rested both on the absence of a hearing before issuance of the temporary injunction and on the Act's failure to require a prompt post-issuance hearing on the merits. (A. 105.) Dealer Association Appellants erroneously suggest that appellees have abandoned the second contention. *See* Brief for Dealer Association Appellants 10. The remoteness in time of the final hearing remains relevant to the inadequacy of the pre-injunction procedures. *See infra* at 37. Moreover, when the state designs new procedures, it must take into account the period of delay preceding the final hearing. *See infra* at 39 n.33. Finally, if this Court were to disagree with the three-judge court's requirement for a pre-issuance hearing, the question whether a prompt post-issuance hearing is required would remain.

[28] *Compare, e.g., Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977), *and Mathews* v. *Eldridge*, 424 U.S. 319 (1976), *and Arnett* v. *Kennedy*, 416 U.S. 134 (1974), *with, e.g., Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *and Bell* v. *Burson*, 402 U.S. 535 (1971).

porary injunction ex parte only upon a showing of need and the posting of a bond.[29] Even assuming that a hearing need not precede a temporary injunction under the Act if a hearing follows promptly, the Act does not require the protestant to support an injunction in a prompt post-issuance hearing or even allow the enjoined parties to show why the injunction should be dissolved.[30] When a final deprivation of "liberty" or "property" is justified only for "cause" or "fault," at least some of the foregoing procedural safeguards must be provided in connection with a temporary or preliminary deprivation. *See, e.g., Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bell* v. *Burson*, 402 U.S. 535 (1971).[31]

[29] *Compare Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), *with, e.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). *See also Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (statutory provision for reimbursement of erroneously suspended disability benefits); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (statutory provision for back pay following erroneous suspension from employment).

[30] *Compare Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), *with Bell* v. *Burson*, 402 U.S. 535 (1971), *and Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[31] In staying the judgment below, Mr. Justice Rehnquist noted that the state has an interest in the orderly resolution of protests. 98 S. Ct. 359, 363 (1977) (Chambers Opinion). The Board, however, merely sits as an adjudicatory tribunal. Consequently, the state interest is simply that protests among private competitors be properly resolved. If this interest suffices to deny all prior procedures in this case, it is difficult to imagine when procedures must ever precede a temporary deprivation of a constitutionally protected interest. If the Act's procedures are constitutional, may not a lawyer be summarily suspended from practice before a particular tribunal on the naked "protest" of a competitor, perhaps even an adversary, pending "orderly" resolution of the protest?

Preliminary procedural protections for the franchisor and franchisee are especially necessary because of the role played by the protesting dealer under the Act. In *Fuentes* v. *Shevin,* 407 U.S. 67, 93 (1972) (footnote omitted), the Court condemned statutes conferring similar unfettered power on private parties:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark."

See also Mitchell v. *W.T. Grant Co.,* 416 U.S. 600, 615-17 (1974); *Gibson* v. *Berryhill,* 411 U.S. 564, 578-79 (1973); *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886).

The same principle was applied in the Court's earlier decision in *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936). There the Court invalidated certain provisions of the Bituminous Coal Conservation Act of 1935 under which wage and hour agreements negotiated between employees and some individual coal producers became binding on other coal producers who were in no way involved in the negotiations. The Court emphasized that

> "in the very nature of things, one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."

Id. at 311. Similarly, the Court has held that a state may not require government officials to adopt, without independent review, a privately mandated course of action. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121-22 (1928); *Eubank* v. *City of Richmond,* 226 U.S. 137, 143-44 (1912)."

Inherent in the concept of due process is a requirement of fundamental fairness. *Memphis Light, Gas & Water Division* v. *Craft,* 98 S. Ct. 1554, 1564 n.19 (1978). On their face, the challenged portions of the Act lack even a semblance of fairness, for they allow established dealers, who already enjoy the fruits of engaging in the retail automobile business, arbitrarily and without risk to their own pecuniary interests to interfere with the rights of others, who are equally qualified and deserving, to participate in those same economic fruits of business endeavor.

The three-judge court went no further than these basic and well-established principles. It required only that *some* procedure be developed where none now exists. It left California free to devise guarantees that will comply with due process.[22] No further inquiry

---

[22] The principal question in *Carter* concerned the reach of congressional power under the Commerce Clause. The Court has long since repudiated *Carter*'s restrictive view of that power. *See Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948). However, the proposition for which *Carter* is relied on here, that state power may not be delegated to private individuals, has never been questioned. *See* 1 K. Davis, Administrative Law § 2.14 (1958); 2 C. Antieau, Modern Constitutional Law § 11:21, at 227 (1969); *cf. McGautha* v. *California,* 402 U.S. 183, 248, 272 n.21 (1971) (Brennan, J., dissenting).

[23] The hearing required is one "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950); *see Bell* v. *Burson,* 402 U.S. 535, 541-42 (1971). The "nature" of establishment and relocation proceedings requires

into the correctness of the judgment is necessary in this case. *See, e.g., Bell* v. *Burson,* 402 U.S. 535, 542-43 (1971). *See also Mathews* v. *Eldridge,* 424 U.S. 319, 333-34 (1976).[34]

---

an inquiry into whether "good cause" exists to disallow the proposed establishment or relocation permanently. *Id.* Appellees recognize that the required hearing is a preliminary one; however, the care with which the predeprivation hearing is conducted must reflect the prolonged period during which the temporary injunction will be in effect. *See, e.g., id.; North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, 607 (1975); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

[34] State Appellants advance an elaborate argument against affording any prior procedures whatsoever, based on *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). Their heavy reliance on *Mathews* is completely misplaced because the question there was whether due process required that a full-dress evidentiary hearing precede suspension of social security disability benefits. The Court held that no such evidentiary hearing was required because, by statute: (1) Termination proceedings were initiated and conducted by responsible public officials. *Id.* at 349. (2) The public officials' decisions were based upon objective, reliable data as to the merits of the termination. *Id.* at 343-45. (3) The benefits recipient was afforded a pre-suspension opportunity to assert his claim, to submit evidence and arguments, and to challenge the correctness of the agency's tentative conclusions. *Id.* at 345-46, 349. (4) A recipient whose benefits were erroneously suspended was made whole if the suspension was subsequently reversed. *Id.* at 340. Here appellees did not seek, and the three-judge court did not require, a full-dress evidentiary hearing, and none of the lesser procedural safeguards involved in *Mathews* is afforded under the Act here challenged.

In any event, the balancing process identified in *Mathews* fully supports the judgment below that *some* prior hearing must be provided. The "liberty" and "property" interests involved in establishment and relocation decisions have always been recognized as important ones, *see supra* at 26-34, and a temporary injunction affects them dramatically. An erroneous deprivation of such interests through issuance of a temporary injunction is highly likely because the Act confers unfettered power on self-interested private

II. THE SUPREMACY CLAUSE ALSO FORBIDS ISSUANCE OF AN AUTOMATIC TEMPORARY INJUNCTION MERELY UPON APPLICATION OF AN INDIVIDUAL'S COMPETITORS.

The Act's grant to private competitors of completely unaccountable power to cause issuance of automatic temporary injunctions is invalid under the Supremacy Clause, as well as the Due Process Clause. Section A first shows that the anticompetitive features of the Act conflict with the federal antitrust laws. Section B then shows that the "state action" doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), does not immunize the Supremacy Clause violation described in Section A. We reemphasize that appellees' conten-

---

parties to compel issuance of temporary injunctions. *See, e.g., Fuentes* v. *Shevin,* 407 U.S. 67, 93 (1972); *Bell* v. *Burson,* 402 U.S. 535, 541-42 (1971); *supra* at 10 n.13. These factors clearly establish the need for *some* kind of pre-injunction hearing, and the state has no countervailing interests allowing complete denial of any type of hearing. The Board, as noted already, cannot investigate or protest an establishment or relocation *sua sponte,* but merely adjudicates protests filed by self-interested dealers. This indicates clearly that the state itself views its substantive interests in such disputes as far less important than the interests it protects in its own regulatory programs. *See, e.g., Fuentes* v. *Shevin,* 407 U.S. 67, 93 & n.30 (1972). State Appellants contend that the state's interest in avoiding fiscal and administrative burdens justifies the state's complete abdication of power to self-interested competitors. Brief for State Appellants 41-44. These concerns never justify denial of all prior procedures. *See, e.g., Mathews* v. *Eldridge,* 424 U.S. 319, 348 (1976); *cf. Marshall* v. *Barlow's, Inc.,* 98 S. Ct. 1816, 1822-26 (1978). When the state affords *some* procedures, it may be heard to argue that *additional* procedures would be unduly burdensome.

When all the factors relevant under *Mathews* are taken into account, it is evident that the three-judge court correctly required that some kind of hearing precede the issuance of a temporary injunction. Indeed, the court could well have gone further and prescribed requirements similar to those which govern the issuance of a temporary injunction in federal court. *See* Fed. R. Civ. P. 65.

tion here is directed solely at the complete absence of procedures before issuance of the temporary injunction; thus, there is no need to consider the state's power to enter a permanent injunction after a hearing and a finding of "good cause." *See supra* at 19-20.

A. Temporary Injunctions Precluding the Entry of New Competition, Obtained with No State Review and Entered Only at the Request of Existing Dealers, Are Contrary to the Federal Antitrust Laws.

Horizontal combinations and conspiracies to restrain trade and allocate markets are so patently pernicious that they have long been held to constitute per se violations of the federal antitrust laws, including the Sherman Act, and participants in such activities are subject to liability for damages. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963). And *all* horizontal territorial restraints and market allocations are, if imposed by private persons, contrary to the central policy of the antitrust laws, whether or not those devices technically violate the Sherman Act and thereby create liability for damages. Thus, any state law allowing private persons to impose such trade restraints is invalid under the Supremacy Clause. *See Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Rice* v. *Alcoholic Beverage Control Appeals Board*, Nos. S.F. 23631, 23632 (Cal. May 30, 1978); *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); 1 P. Areeda & D. Turner, Antitrust Law § 209, at 61-62 (1978).[35]

[35] The Court recently noted that "an adverse effect on competition [is not], *in and of itself*, enough to render a state statute invalid" by reason of a conflict with "the central policy of the Sherman Act." *Exxon Corp.* v. *Governor of Maryland*, 46 U.S.L.W. 4662, 4666 (June 14, 1978) (emphasis added). Appellees make no such contention. They contend that the temporary injunction provisions conflict with the "central policy of the Sherman Act" not solely because those provisions adversely affect competition, but rather because the adverse effect on competition flows from the unsupervised use of state power by private individuals.

Such principles were early applied in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). When *Schwegmann* was decided, the Miller-Tydings Act, 50 Stat. 693, allowed certain contracts for resale price maintenance as a matter of federal law, although other price fixing was per se violative of the Sherman Act. 341 U.S. at 386. A Louisiana statute permitted, but did not compel, a distributor (1) to contract with retailers in Louisiana to establish minimum price schedules (which was permissible under federal law) and, further, (2) to enforce those schedules against all nonsigning retailers in the state who had knowledge of such contracts. Since the state did not regulate the terms of the minimum price contracts in any way, the Louisiana statute actually conferred unsupervised power on private persons to fix prices for nonsigning retailers.

A liquor distributor, acting pursuant to the Louisiana statute, sought to enjoin a nonsigning liquor retailer from selling below the contractually established price. The distributor's contracts with other retailers were legal under then existing state and federal law, and the enforceability of the price schedules against nonsigners arose from Louisiana law, not the actions of the distributor. Nonetheless, without inquiry into whether the distributor had violated the antitrust

laws, the Court held that the Miller-Tydings Act did not authorize enforcement of minimum price schedules against nonsigners and that, under the Supremacy Clause, Louisiana could not empower the distributor, a private person, to fix prices. *See* 1 P. Areeda & D. Turner, Antitrust Law § 209 (1978). The Court noted that "[t]he fact that a state authorizes the price fixing [by private parties] does not, of course, give immunity to the scheme, absent approval by Congress." 341 U.S. at 386.[36]

A similar result was reached recently by the Supreme Court of California in *Rice* v. *Alcoholic Beverage Control Appeals Board,* Nos. S.F. 23631, 23632 (May 30, 1978). There the question was whether the Sherman Act preempted a California statute (1) requiring manufacturers of brand name liquors to post a minimum price schedule for their products with the Department of Alcoholic Beverage Control and (2) requiring retail dealers to adhere to those minimum prices. The Department of Alcoholic Beverage Control exercised no power of review whatsoever over the posted prices.

---

[36] It is clear that Congress intends the antitrust laws to apply fully to automobile franchising practices. In enacting the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225, Congress provided that the legislation did not "repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States." *Id.* § 1224. And the report by the House Committee on the Judiciary emphasized:

> "[T]he bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of this legislation.*"

House Comm. on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. 9-10 (1956) (emphasis added).

Administrative proceedings were initiated under the California statute against a retailer for selling below the price schedule, and the retailer challenged enforcement of the statute under the Supremacy Clause. The Supreme Court of California framed its inquiry carefully, indicating clearly that the question was whether the California statute was invalid under the Supremacy Clause, not whether anyone acting under the statute was liable for violating the Sherman Act. Slip op. at 10, 23, 33, 42, 47. Relying on *Schwegmann,* the court then held that the statute was preempted because it impermissibly allowed private persons to fix prices without state supervision.

The significance of *Schwegmann* and *Rice* is clear. In each case, the state purported to allow or require private persons to bring about a result clearly inconsistent with the federal antitrust laws. In each case, the decision simply by-passed the question whether the private persons were liable for damages and looked instead at the question whether the state law conflicted with the federal antitrust laws. *Schwegmann* and *Rice* thus demonstrate that federal antitrust policy may not be subverted by state legislation that authorizes, or even compels, private parties to undertake unsupervised anticompetitive activities.

The establishment and relocation protest provisions under consideration in this case present just the situation addressed in *Schwegmann* and *Rice,* for the temporary injunction provisions authorize private persons to undertake unsupervised anticompetitive activities. As has been shown, the challenged portions of the Act confer unrestrained power on private persons, acting alone or in concert, to invoke state power to preserve their position in the marketplace for ex-

tended periods of time by arbitrarily precluding the entry or relocation of horizontal competitors.[37] These results flow automatically from the discretionary acts of private persons who choose to protest—and not just any person, but the very one or more private persons least likely to favor competition from a new or relocated dealer and most likely to benefit from the erection of artificial barriers against new market entry.

The results encouraged and permitted by the Act could not conflict more clearly with the policies of the federal antitrust laws against horizontal territorial restraints and market allocations. *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).[38]

---

[37] As noted above, the temporary injunction provisions empower protesting dealers unilaterally to exclude new horizontal competitors or to prevent existing competitors from relocating in a 314-square-mile area—an area larger than any city in California except San Diego (316.9) or Los Angeles (463.7), and which often includes hundreds of thousands or millions of consumers. *See supra* at 30 n.22. Even though a potential new entrant or an existing competitor seeking to relocate may ultimately enter the market after final resolution of a protest, the unilaterally obtained prehearing injunction and the attendant delay, uncertainty, and expense have an obvious chilling effect upon new competitive entry. Indeed, in some cases the protest provisions may prevent entry or relocation altogether.

[38] The conflict is made crystal clear by *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). Whenever Holiday Inns received a franchise application, it notified at least the three Holiday Inn franchisees nearest to the site proposed for the new franchise. When the establishment of a franchise in Elizabeth, N.J., was opposed, Holiday Inns treated the protests as an unreviewable "veto." The Court held that Holiday Inns' conduct with regard to the proposed Elizabeth franchise was a per se violation of the Sherman Act.

> "By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the . . . market, [defendant] enabled its franchisees already in the . . . area to divide that market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act."

Id. at 1242. The conduct in Holiday Inns not only violated the Sherman Act but also—obviously—conflicted with the policy of the Sherman Act. Implementation of the establishment and relocation protest provisions has an identical result, except that the Act empowers private dealers to force the Board to rubber stamp their "vetoes" by automatically issuing a temporary injunction.

Indeed, the Attorney General of California opposed the challenged provisions of the Act on this very ground when they were before the California legislature, explaining:

> "Assembly Bill 225 . . . has an apparent anti-competitive effect on the new car market. . . .
>
> "The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.
>
> "Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963)."

Letter of August 3, 1973 from Attorney General Evelle Younger of the State of California to Assemblyman J.A. Gonsalves of the California State Assembly. (A. 269-70.)[39] As in *Schwegmann* and *Rice*, therefore, the Act is invalid under the Supremacy Clause.

---

[39] State Appellants have previously tried to explain away the Attorney General's letter on the ground that the burden of proof in establishment and relocation cases was subsequently shifted from the manufacturer and entering dealer to the protesting dealer. (Defendants' Memorandum of Sept. 21, 1976, re Letter of Califor-

B. The Conflict with the Antitrust Laws Is Not Permitted Under *Parker* v. *Brown* Because the Board Makes No Independent Judgment of the Necessity for the Anticompetitive Action.

Dealer Association Appellants contend that the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), immunizes the establishment and relocation provisions from challenge under the Supremacy Clause. Brief for Dealer Association Appellants 19-23. As already suggested, however, the Court has never extended *Parker* so broadly as to allow a state agency to issue temporary injunctions automatically at the behest of a competitor (*i.e.*, without state supervision).

This Court has upheld a *Parker* "state action" defense only in *Parker* itself and *Bates* v. *State Bar*, 433 U.S. 350 (1977). In *Parker* the Court reversed an injunction against enforcement of the California Agricultural Prorate Act, pursuant to which the state restrained competition in the marketing of raisins. Private individuals played a significant role in the proposal, formulation, and final adoption of a marketing plan. 317 U.S. at 346-47, 352. But no competitive restraints were imposed until after elaborate state review. Affected parties could be heard in opposition to a proposed plan, and two separate determinations were required by state officials, independent of the farming industry, that a proposed plan met the objectives and requirements of the Agricultural Prorate Act. *Id.* at 346-47. The Court's description of the elaborate statutory procedures is reproduced in the margin.[40]

nia Attorney General.) But if the Act as a whole would have been unconstitutional if the enjoined parties bore the burden of proof, the temporary injunction provisions are unconstitutional a fortiori because the Act requires automatic issuance of a temporary injunction *whenever* a protest is filed, without regard to such "niceties" as burdens of proof.

In *Bates* v. *State Bar*, 433 U.S. 350, 362 (1977), the Court rejected the contention that the Supremacy Clause invalidated a rule of the Supreme Court of Arizona forbidding attorney advertising.

> "The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern

[40] "Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone (§ 8), and after a public hearing (§ 9), and after making prescribed economic findings (§ 10) showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. The Director, with the approval of the Commission, is then required to select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers who receive the regulated commodity from producers for marketing. §§ 11, 14, 15.

"The program committee is required (§ 15) to formulate a proration marketing program for the commodity produced in the zone, which the Commission is authorized to approve after a public hearing and a 'finding that the program is reasonably calculated to carry out the objectives of the Act.' The Commission may, if so advised, modify the program and approve it as modified. If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted. § 16." 317 U.S. at 346-47.

that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."

Thus, while many controversies have raged about *Parker*, it requires at a minimum that a state's imposition of an anticompetitive restraint be a responsible act of government. *Compare Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790-92 (1975). When the state regulates on a case-by-case basis at the initiative of private parties, it must provide prior procedures, as it did in *Parker*, if it is to act responsibly.[41] If, as here, procedures are absent in such circumstances, private individuals are allowed to "masquerad[e]" as the state, *Asheville Tobacco Board* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959), a result never countenanced by this Court. *See Goldfarb* v. *Virginia State Bar*, 421

[41] The *Parker* requirement for adequate procedures has been stressed by two noted commentators: When the state regulates, at the initiative of private parties, on a case-by-case basis, *Parker* requires "statutory approval procedures designed (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow judicial review of the agency record." 1 P. Areeda & D. Turner, Antitrust Law § 213f, at 78-79 (1978). This requirement is especially clear after *Bates*. The anticompetitive restraint there was a general policy embodied in a self-executing rule, yet the Court stressed that sanctions were actually applied only in proceedings in which the policy was constantly reevaluated. 433 U.S. at 362. If procedural guarantees are important in that context, they must be required a fortiori when the state regulates only through adjudications initiated by private parties.

U.S. 773, 791-92 (1975); *Gibson* v. *Berryhill*, 411 U.S. 564, 578-79 (1973)."

These principles were applied in *Woods Exploration & Producing Co.* v. *Aluminum Co.*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). There the holders of a small part of a gas field brought an antitrust action against the holders of the remainder of the field, alleging that the latter had conspired to restrain trade in, and to monopolize, production in the field. The large holders had made certain misrepresentations to the Texas Railroad Commission, which regulated production in the field, causing it to set production quotas that were detrimental to the small producers. The defendants invoked *Parker*, but the court held that *Parker* was not applicable because the defendants' misrepresentations rendered "meaningful" state action impossible:

> "[In light of the misrepresentations] [t]here was . . . no opportunity for meaningful supervision or verification. Because of the amount and character of [production quota petitions], the Railroad Commission of necessity must rely on the truthfulness of the gas producers. Such facts are usually within the exclusive control of those producers, so the final order of the Commission often must accept the [proposed production quota] at face value. Hence, defendants' conduct here can in no way be said to

[42] In fact, the recent cases of this Court have limited *Parker* to cases where the anticompetitive conduct is compelled by the statute or the acts of the state official. *Compare Bates* v. *State Bar*, 433 U.S. 350 (1977), *with Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), *and Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Since the Board is merely given the authority to approve anticompetitive restraints sought by a private party, *Parker* might not apply even after the Board gave such approval. This question, however, need not be reached here. *See supra* at 19-20.

have become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts."

Id. at 1295. Here the Board, to whom no facts must be provided, is no more—and perhaps less—"the real decision maker."

The same principles were also applied in *Rice* v. *Alcoholic Beverage Control Appeals Board,* Nos. S.F. 23631, 23632 (Cal. May 30, 1978), discussed above, where the Supreme Court of California emphatically rejected the contention that *Parker* immunized the state statute described *supra* at 44:

> "Neither *Parker* nor *Bates,* the two cases which found exemptions from the Sherman Act on the ground of state action, involved private conduct the substance of which was totally unconfined by state regulation.
>
> ". . . .
>
> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy. Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the department urges, that this scheme is immune from the Sherman Act."

Slip op. at 20-22. *Rice* is particularly persuasive here because it represents an articulation by California's highest court of what California believes is necessary for anticompetitive statutes to survive attack under the Supremacy Clause.

We have shown, then, that the power conferred on the protesting dealers conflicts with the federal antitrust laws and that *Parker* is not applicable. Because of this unimmunized conflict, the establishment and relocation provisions violate the Supremacy Clause. As the Court explained in *Perez* v. *Campbell,* 402 U.S. 637, 649 (1971):

> "As early as *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State Legislatures . . . [which] *interfere with,* or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause. *Id.,* at 211 (emphasis added). . . . '[i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[43]

---

[43] The temporary injunction provisions of the Act also must fall because they violate the Commerce Clause. *See supra* at 3. A state law imposing a burden on interstate commerce is permissible only if it effectuates a legitimate local purpose and, even then, only if it does not burden commerce excessively and if no less burdensome means of promoting the same local purpose exists. *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 371-72 (1976).

The initial inquiry, of course, is whether the Act affects interstate commerce. General Motors sells new motor vehicles, parts, and accessories to franchised dealers, including Fox and Muller, in interstate commerce. The relationship between an out-of-state manufacturer and in-state purchasers to whom he sells for resale is in interstate commerce. *See, e.g., Missouri* v. *Kansas Natural Gas Co.,*

III. THE THREE-JUDGE COURT PROPERLY REFUSED TO ABSTAIN.

The three-judge court denied State Appellants' motion to abstain, which was based solely on the doctrine of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496

---

265 U.S. 298, 306-09 (1924). Every temporary injunction against the establishment or relocation of a franchise therefore affects the flow of interstate commerce by delaying the opening of a new channel of interstate commerce and by delaying the sale of new motor vehicles, parts, and accessories at certain locations for indefinite periods. *American Motors Sales Corp.* v. *Division of Motor Vehicles*, 445 F. Supp. 902, 905 (E.D. Va. 1978); *General GMC Trucks, Inc.* v. *General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194, *cert. denied*, 434 U.S. 996 (1977); *see H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 538-41 (1949).

The temporary injunction provisions therefore may be sustained only if they advance a legitimate purpose and do so without unnecessarily burdening interstate commerce. *See supra.* State Appellants identify two allegedly legitimate local purposes for the establishment and relocation provisions in general: (1) the protection of dealers from undue control by manufacturers and (2) the protection of consumers from the inadequate service that might result if there is "too much" competition in a "relevant market area." *See* Brief for State Appellants 41-42. The same state interests were asserted to justify a very similar state statute, *see* Brief for Dealer Association Appellants 11, in *American Motors Sales Corp.* v. *Division of Motor Vehicles*, 445 F. Supp. 902 (E.D. Va. 1978). However, in a carefully reasoned opinion, the court found that the Commerce Clause was violated by a *permanent* injunction, issued after a hearing, under such a statute.

The *American Motors* court ruled that the state's first interest, in protection of dealers from actions deliberately intended to injure them, is a legitimate local interest, but that the statutory provisions swept too broadly, because establishment of a franchise could be prevented even if the manufacturer acted in good faith. *Id.* at 907-11, *citing Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976). The Act likewise has no bad faith requirement for a permanent injunction, *see* Cal. Veh. Code § 3062(a); moreover, California has many other protections against actions alleged to

(1941)—notwithstanding State Appellants' present reliance on the doctrine of *Younger* v. *Harris*, 401

---

have been taken by manufacturers in bad faith. *See supra* at 5 n.3, 35 n.26.

The state's second interest, in restriction of "destructive" competition among automobile dealerships, was held to be an impermissible local purpose. 445 F. Supp. at 905-07, *citing H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *Buck* v. *Kuykendall*, 267 U.S. 307 (1925). *See also City of Philadelphia* v. *New Jersey*, 46 U.S.L.W. 4801, 4803 (U.S. June 23, 1978). When they affect interstate commerce, state attempts to restrain "destructive" competition are impermissible unless the problem is of a "local character," which "because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." *Parker* v. *Brown*, 317 U.S. 341, 362-63 (1943). By no stretch of the imagination do the problems allegedly addressed by the Act fit the description in *Parker*. Congress has already addressed the "problem" of establishment and relocation decisions, indicating unequivocally that it did not want to prevent good-faith appointments of additional franchises. *See supra* at 44 n.36. Moreover, the "problems" of franchise establishment and relocation are not of peculiarly local concern. *See* House Comm. on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. 3 (1956) ("collectively the automobile-dealer group is of great importance to the [national] economy"). Any problems caused by "destructive" competition in this nationwide industry are therefore problems to be addressed by Congress. *See, e.g., Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924). Moreover, even if state restriction of competition to protect consumer interests were permissible, the Act again sweeps too broadly because the state's interest could be served by direct prohibitions against manufacturer practices threatening consumer interests. *See supra* at 5 n.3, 35 n.26.

These considerations would fully support a judgment that the permanent injunction provisions of the Act violate the Commerce Clause. The automatic temporary injunction provisions therefore are a fortiori unconstitutional. They may be invoked by private competitors without any state inquiry into whether legitimate state interests are at stake. They therefore unquestionably sweep too broadly because an appropriate preliminary hearing before issuance of the temporary injunction would fully protect whatever valid interests the state has.

U.S. 37 (1971). (A. 86-98.)" The court held that "there is no ambiguity [in the Act] that could be resolved [under *Pullman*] in such manner as to harmonize [the Act] with the requirements of due process." 440 F. Supp. at 442.

A. Pullman Abstention Is Completely Unwarranted in Light of the Clarity of the Act.

Pullman abstention is a departure from the ordinary obligation of federal courts to resolve federal claims properly before them, *see, e.g., Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821), a departure reserved for "special circumstances." *See, e.g., Zwickler* v. *Koota,* 389 U.S. 241, 248 (1967). The "special circumstances" justifying *Pullman* abstention arise when constitutional adjudication could be avoided by state resolution of an "unsettled" question of state law. *Harris County Commissioners Court* v. *Moore,* 420 U.S. 77, 83 (1975). State law is "unsettled" only if state construction would be "likely" to avoid or modify the constitutional question. *See id.* There is no need to abstain for an "unlikely" state ruling, *see, e.g., City of Chicago* v. *Atchison, T. & S.F.R.,* 357 U.S. 77, 84 (1958), or a ruling that would not " 'materially change the nature of the problem.' " *Bellotti* v. *Baird,* 428 U.S. 132, 147 (1976).

Under these standards, abstention was clearly inappropriate here. On the one hand, the Act specifically and unambiguously requires proposed establishments and relocations to be enjoined automatically

---

[44] State Appellants' motion erroneously sought dismissal of appellees' suit, rather than a stay of proceedings, on *Pullman* grounds. *See, e.g., Zwickler* v. *Koota,* 389 U.S. 241, 244 n.4 (1967).

upon the filing of protest, without any prior hearing. A statutory requirement of prior procedures is not only not "likely," it would be impossible to read it into the Act, as three judges familiar with California law specifically found. On the other hand, no other possible construction of the Act would be "material" to appellees' claim that the Due Process and Supremacy Clauses forbid issuance of a temporary injunction without any prior procedures.

The clearest proof of the inappropriateness of abstention is the insubstantiality of the grounds for abstention advanced by State Appellants. Although their argument is difficult to parse, they appear to advance three grounds for abstention: (1) Even though the state statute does not provide for it, a state court *might* require a pre-issuance or prompt post-issuance hearing as a matter of state law. (2) A state court *might* construe § 3062(a) to require the franchisor to give notice at some very early point in the establishment or relocation process. (3) Proceedings are pending in which a state court *might* invalidate the Act on state law grounds. Brief for State Appellants 62-69.

We emphasize initially that State Appellants merely suggest that these things *might* happen. They do not purport to advocate any of these allegedly possible state-law holdings. *Compare Bellotti* v. *Baird,* 428 U.S. 132, 143-46 (1976); *Carey* v. *Sugar,* 425 U.S. 73, 79 (1976). Nor do they show why the state courts might reach them. *Compare Harris County Commissioners Court* v. *Moore,* 420 U.S. 77, 86-87 (1975); *Lake Carriers' Association* v. *MacMullan,* 426 U.S. 498, 511-12 (1972). These circumstances, by themselves, warrant a healthy skepticism as to whether

abstention is appropriate and certainly do not support the argument that the three-judge court abused its discretion by refusing to abstain. *Cf. City of Chicago* v. *Atchison, T.&S.F.R.*, 357 U.S. 77, 84 (1958).

1. California Courts Would Not Avoid the Necessity for Constitutional Litigation by Requiring a Pre-Injunction Hearing.

State Appellants' first contention is that a state court *might* require a pre-issuance or prompt post-issuance hearing as a matter of state law, even though the language of the Act does not so provide. In support, they cite *Endler* v. *Schutzbank,* 68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968), and *Rios* v. *Cozens,* 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated and remanded,* 410 U.S. 425, *reinstated,* 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973). *Endler,* however, involved no issue of state law concerning the right to a hearing. The court there held that the plaintiff, a licensed financial broker, stated a cause of action for denial of federal due process rights by alleging that the State Commissioner of Corporations had barred him from employment in brokerage houses without affording him an opportunity to rebut allegations of dishonesty. 68 Cal. 2d at 169-70, 436 P.2d at 302-03, 65 Cal. Rptr. at 302-03.[45] Similarly, in *Rios,* the court relied on the Due Process Clause of the Fourteenth Amendment

[45] The Court went on to note that *if* plaintiff proved such a denial of federal constitutional rights, the Commissioner of Corporations had statutory authority under sections of the California Financial Code—wholly inapplicable to the Vehicle Code involved here—to provide the hearing to which plaintiff was entitled under the Fourteenth Amendment. 68 Cal. 2d at 182 n.16, 436 P.2d at 311 n.16, 65 Cal. Rptr. at 311 n.16.

and on the parallel provision of the California Constitution, Art. I, § 13, to hold that an uninsured motorist's license may not be suspended after an accident unless the motorist is first given an oral hearing.[46] Thus, the only possibly relevant state law is Art. I, § 13, and abstention is not required where a state law challenge would rest on a state constitutional provision parallel to the Fourteenth Amendment. *See Examining Board* v. *Otero,* 426 U.S. 572, 597-98 (1976); *Harris County Commissioners Court* v. *Moore,* 420 U.S. 77, 84 n.8 (1975); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971). Moreover, in neither *Endler* nor *Rios* was there an explicit statutory requirement that the government agency act automatically upon the receipt of a complaint from a private person.

2. A Statutory Requirement of Early Notice, Even If Imposed, Would Not Materially Alter This Case.

State Appellants' second contention is that § 3062 (a) is ambiguous concerning when notice of a proposed establishment or relocation must be given. A state court therefore *might* require notice to be given very early during the franchisor's decisionmaking process, "modify[ing] the federal claim, and thus render[ing] abstention under *Pullman* both appropriate and necessary." Brief for State Appellants 69.

State Appellants themselves concede, however, that such a construction is not "likely," noting that early

[46] Since an uninsured motorist was already entitled to make a written submission, the precise question in *Rios* was not whether some kind of hearing was required but whether a "hearing" based solely on written submissions was constitutionally sufficient.

notice is not required under the plain language of the "unconstrued" Act. Brief for State Appellants 37. More importantly, such a construction would not "materially" alter this case. State Appellants merely urge that this construction would make the practical impact of the Act "somewhat" less burdensome. Brief for State Appellants 68. As the three-judge court explained, however, the Act would impermissibly affect manufacturers and franchisees even if construed to require some sort of "early" notice:

> "In the case of Muller, it appears that the negotiations for the lease of the new premises were protracted and involved many problems that were uncertain of satisfactory solution. It would hardly have been practical for Muller to publish an intention to relocate, thus inspiring almost inevitable protest, and go through an expensive hearing without knowing that the desired premises were available. It is also not hard to imagine the dampening effect upon the negotiations that would be imposed by the awareness of the long delay in completion of the transaction that any irresponsible protest could inherently cause."

440 F. Supp. at 441. Thus, the statutory construction suggested by appellants would not alter the constitutional questions presented here.

3. The Three-Judge Court Was Not Required To Abstain Pending Resolution of Any State Proceedings.

State Appellants contend, finally, that this Court should order abstention because two pending state proceedings, not involving appellees, *might* result in invalidation of the Act as "an invalid exercise of the police power under the California Constitution and an

impermissible delegation of legislative authority." Brief for State Appellants 62-63 & n.14. Abstention was not and is not required because the state constitutional issues cited by State Appellants merely parallel federal guarantees. *See supra* at 59." Moreover, the Board was enforcing the Act, as written, during the pendency of these state proceedings, a circumstance this Court has previously held counsels against abstention. *Gibson* v. *Berryhill,* 411 U.S. 564, 580 (1973).

To hold that abstention is required on the basis of the unsupportable and speculative contentions made by State Appellants would conflict with the recent admonition of this Court in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 481 (1977):

> "As has been noted, *Pullman* abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or mate-

---

[47] California determines whether a statute involves an "invalid exercise of police power" as a question of "substantive due process" under the federal Due Process Clause and the parallel state guarantee, now Calif. Const. Art. 1, § 13, as is demonstrated by the very cases relied on by State Appellants. *See, e.g., State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.,* 40 Cal. 2d 436, 254 P.2d 29 (1953). And contrary to State Appellants' assertion, the Supreme Court of California has explicitly held that California courts may not inquire into the "wisdom" of economic regulation. *See, e.g., Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control,* 65 Cal. 2d 349, 359, 420 P.2d 735, 742, 55 Cal. Rptr. 23, 33 (1966) ("As we have said, we cannot invalidate legislation merely because we do not approve of its potentially beneficient impact . . . .") The question whether legislation involves an impermissible delegation of legislative authority is also parallel to inquiry under the federal due process prohibition against impermissible delegation. *See, e.g., Blumenthal* v. *Board of Medical Examiners,* 57 Cal. 2d 228, 236, 368 P.2d 101, 105, 18 Cal. Rptr. 501, 505 (1962); *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.,* 40 Cal. 2d 436, 448-49, 254 P.2d 29, 36 (1953).

rially alter the constitutional issue presented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented. That point has been reached and surpassed here."

B. Younger Abstention Would Have Been Completely Inappropriate Even If It Had Been Raised in a Timely Fashion.

For the first time in this litigation, it is argued that, in light of *Younger* v. *Harris*, 401 U.S. 37 (1971), the three-judge court should have dismissed the suit because of the pendency of the Fox and Muller protests before the Board.[48] No appellant made this argument below; indeed, State Appellants did not rely on *Younger* at all.[49]

---

[48] This issue was not presented in either Jurisdictional Statement. *See* Juris. St. of State Appellants 4, 17-25; Juris. St. of Dealer Association Appellants 4.

[49] Dealer Association Appellants' motion to abstain below relied on *Younger* but was limited to urging dismissal because of the pendency of certain *judicial* proceedings ancillary to the Fox and Muller protests. In these judicial proceedings the protestants in the Fox and Muller cases sought to compel the Board to allow them to depose certain General Motors personnel. General Motors appeared as a real party in interest in that litigation, which was on appeal from the trial court's ruling when the instant suit was filed. (Plaintiffs' Reply of Aug. 19, 1976, to Intervenors' Antitrust and Abstention Arguments 10.) *Younger* could have no possible applicability to those state judicial proceedings. First, the judicial proceedings did not bear the slightest resemblance to the *enforcement* proceedings involved in *Younger* v. *Harris*, 401 U.S. 37 (1971), *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice* v. *Vail*, 430 U.S. 327 (1977), and *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). Second, appellees' attack on the constitutionality of the Act in no way sought to restrain the mandamus proceedings themselves. Finally, the state court proceedings had been concluded by the time the three-judge court rendered judgment in this case. In any event, this contention has not been revived.

Had the contention been advanced below, the three-judge court would properly have refused to dismiss. To begin with, *Younger* is not applicable to administrative proceedings brought by a private party, in which the state's own enforcement policies are not involved. *See Trainor* v. *Hernandez*, 431 U.S. 434 (1977) (protection of public fisc); *Juidice* v. *Vail*, 430 U.S. 327 (1977) (judicial contempt); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) (obscenity nuisance proceedings). But even if *Younger* were deemed relevant to proceedings similar to those before the Board, dismissal under *Younger* would have been inappropriate here. The predicate for a *Younger* dismissal is an "opportunity to raise and have *timely* decided by a *competent* state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added). As will be shown, the Board was not a "competent" state tribunal, so appellees clearly had no opportunity to obtain a "timely" resolution of their constitutional challenges.

Administrative agencies like the Board are not competent, as a matter of law or of fact, to resolve constitutional challenges to the statutes under which they operate. As a matter of California law, an administrative agency may not declare a state statute unconstitutional or refuse to enforce a statute on grounds of unconstitutionality.[50] Even if the Board could adjudicate con-

---

[50] See Cal. Const. Art. III, § 3.5 (adopted June 6, 1978). Even before the recent adoption of Art. III, § 3.5, only those administrative agencies created by the state constitution were empowered to pass on the constitutionality of a state statute. *Compare Hand* v. *Board of Examiners*, 66 Cal. App. 3d 605, 619-20, 136 Cal. Rptr.

stitutional issues, California itself would view the Board as incapable of resolving such issues "competently." As the Supreme Court of California has said:

> "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions."

State v. *Superior Court,* 12 Cal. 3d 237, 251, 524 P.2d 1281, 1290, 115 Cal. Rptr. 497, 506 (1974). The Board, which is also a "predonderantly lay" body, is the very kind of agency the court had in mind.[51]

Clearly, then, the protest proceedings offered a completely inadequate forum for resolution of appellees' constitutional challenges. State Appellants attempt to brush aside this glaring deficiency by arguing that the unconstitutionality of the Act could have been raised in court review of the administrative proceedings if the protests had terminated adversely to appellees. The Court rejected this very contention in *Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973), because court re-

---

187, 196 (1st Dist. 1977), *with Southern Pacific Transportation Co.* v. *Public Utilities Commission,* 18 Cal.3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976). The Board was created by statute, Cal. Veh. Code § 3000, and therefore is barred from adjudicating constitutional issues.

[51] The Board is required by statute to include five public members, only one of whom is to be a lawyer. Additional members of the Board are licensed dealers who may not participate in the resolution of protests. Cal. Veh. Code §§ 3000, 3001, 3050(d).

view proceedings do not provide a "timely" forum."[52] This is especially true in a case such as this one. Appellees could obtain judicial review only if a permanent injunction had been issued by the Board. If a reviewing court upheld the Board's permanent injunction on the merits, the court would be unlikely to conclude that the temporary injunction had been improvidently granted. And if the court reversed on the merits, the constitutionality of the temporary injunction would likewise never be reached. Moreover, even if a state court somehow reached the constitutional objections, an irreparable constitutional violation would have occurred during the many months the temporary injunction, automatically issued, had been in effect without any notice, hearing, or other state review. Finally, since protests are in fact almost never upheld on the merits, a manufacturer in particular could be subjected time and time again to unconstitutional temporary injunctions without ever obtaining judicial consideration of the constitutional challenges presented here.[53]

---

[52] Moreover, Fox and Muller, the two parties most disastrously affected by an adverse decision on the merits, would not be able to appeal from an adverse decision by the Board. *See supra* at 8 n.10.

[53] In fact, *Younger* is inapplicable because of the very multiplicity of the protests to which manufacturers and dealers may be subject. *Younger,* its predecessors, and its successors have dealt with a "single" judicial proceeding. *See, e.g.,* 401 U.S. at 46; *Beal* v. *Missouri Pacific R.,* 312 U.S. 45, 50 (1941); *Kugler* v. *Helfant,* 421 U.S. 117, 124 (1975). When a party is subjected to a multiplicity of proceedings, he suffers far more than "the cost, anxiety, and inconvenience of having to defend against a single [proceeding]." *Younger* v. *Harris,* 401 U.S. at 46; *see also Spielman Motor Co.* v. *Dodge,* 295 U.S. 89 (1935). The great hardship of defending multiple proceedings constitutes an "exceptional circumstance" under which *Younger* is not applicable. *See* 401 U.S. at 53-54.

All of the foregoing, however, is largely academic. As a direct consequence of State Appellants' failure to raise the issue below, any force that a timely *Younger* motion might have had is now completely dissipated. The protests involving Fox and Muller proceeded to completion, ending favorably to Fox, Muller, and General Motors on the merits, before decision on appellees' motion for partial summary judgment. (Jennings Affidavit of Oct. 11, 1977, at 5-6, attached as Ex. E to the Application for Order Staying Judgment presented to Mr. Justice Rehnquist.) Thus, the injunction below did not in fact interfere with the conduct or disposition of the protests pending when suit was filed, *compare Trainor* v. *Hernandez,* 431 U.S. 434, 445-46 (1977), and the suit in effect became one for prospective relief only, a situation in which *Younger* is not applicable. *See, e.g., Wooley* v. *Maynard,* 430 U.S. 705 (1977). *Younger* can hardly demand the futile act of undoing the judgment below simply because the three-judge court had the case under submission as the protests proceeded to conclusion.[54] *See Bellotti* v. *Baird,* 428 U.S. 132, 143 n. 10 (1976).

---

[54] The principles underlying *Younger* are not jurisdictional in nature. *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 480 (1977); *Sosna* v. *Iowa,* 419 U.S. 393, 396 n.3 (1975). In light of the failure of any appellant to raise this issue below or in a Jurisdictional Statement, *see* Sup. Ct. Rule 40(d)(2), the Court should not reach the issue at all. *See Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 468 n.5 (1976). In any event, State Appellants' contention must be evaluated in light of their failure to raise it in a timely fashion, as discussed in the text.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge court should be affirmed.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
GIRARD E. BOUDREAU, JR.
JOHN G. NILES
Attorneys for Appellees
Orrin W. Fox Co.,
Muller Chevrolet, and
General Motors Corporation

GEORGE R. BAFFA
Attorney for Appellee
Orrin W. Fox Co.

NORIN T. GRANCELL
Attorney for Appellee
Muller Chevrolet

Of Counsel:

O'MELVENY & MYERS
HAHN & HAHN
GRANCELL, KEGEL & TOBIN
A Professional Corporation

OTIS M. SMITH
General Counsel
ROBERT W. CULVER
General Motors Corporation

July 7, 1978

FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California,
Appellants,

vs.

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the Central District of California

REPLY BRIEF FOR APPELLANTS

EVELLE J. YOUNGER,
Attorney General of the State of California,

ROBERT L. MUKAI,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, California 95814,

Counsel for Appellant New Motor Vehicle Board of the State of California,

STEPHEN J. EGAN,
Deputy Attorney General,
555 Capitol Mall, Suite 350,
Sacramento, California 95814,

Counsel for Appellants Department of Motor Vehicles of the State of California, and Doris V. Alexis, Director thereof.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7688

SUBJECT INDEX

	Page
Preliminary statement	1
Argument	3
Appellees' claim that the California Automobile Franchise Act is preempted by reason of conflict with Federal Antitrust law cannot stand as an alternative ground for affirmance of the district court's partial summary judgment	3
A. Invalidation of a state statute upon the assertion that it conflicts with federal antitrust law is unwarranted where no conduct violative of any federal antitrust statute has been pleaded, proved or found, and where no such conduct has been shown to be ratified or encouraged by the state statute	3
B. Even if the operation of the Act produced a result otherwise violative of a federal antitrust statute, that result would be permissible as state action under the doctrine of Parker v. Brown, 317 U.S. 341 (1943)	15
Conclusion	23

TABLE OF AUTHORITIES CITED

Cases

	Page
Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947)	2
A. F. of L. v. American Sash Co., 335 U.S. 538 (1949)	20
American Motor Inns Inc. v. Holiday Inns Inc., 521 F.2d 1230 (3d Cir. 1975)	8, 9, 10
Bates v. State Bar of Arizona, 433 U.S. 350	16, 20
Bennett v. People of the State of California, 406 F.2d 36 (9th Cir. 1969), cert. den. 394 U.S. 966	3
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	7
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	20
City of Lafayette v. Louisiana Power & Light Co. ....U.S. ...., 55 L.Ed.2d 364 (1978)	15
Dandridge v. Williams, 397 U.S. 471	2
Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	22
Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	7
Exxon Corp. v. Governor of Maryland, ... U.S. ...., 57 L.Ed2d 91 (1978)	5, 11, 22, 23
Ferguson v. Skrupa, 372 U.S. 726 (1963)	14

TABLE OF AUTHORITIES CITED

	Page
Florida Lime v. Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	13
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976)	23
H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949)	22
Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966), reh. den. 384 U.S. 967	4, 5
Langnes v. Green, 282 U.S. 531 (1931)	2
Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F.Supp. 453 (W.D. Pa. 1968) aff'd 417 F.2d 622 (3d Cir. 1969)	17
Muskopf v. Corning Hospital District, 55 Cal.2d 211 (1961)	2, 3
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	7
Parker v. Brown, 317 U.S. 341 (1943)	2, 9, 12, 15, 16, 17, 19, 20, 21, 22
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	23
Ray v. Atlantic Richfield Co., ... U.S. ...., 55 L.Ed.2d 179 (1978)	3, 4, 13, 14
Rea v. Ford Motor Co., 355 F.Supp. 842 (W.D. Pa. 1973) vacated and remanded 497 F.2d 577 (3d Cir. 1974)	17
Rice v. Alcoholic Beverage Control Appeals Board (1978) 21 Cal.3d 431	13
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	3
Savage v. Jones, 225 U.S. 501 (1912)	4
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	11, 12, 13
Semler v. Oregon Board of Dental Examiners, 294 U.S. 608 (1935)	19
Standard Oil Co. v. United States, 221 U.S. 1 (1911)	9
State of Alabama v. Pugh, ... U.S. ...., 57 L.Ed.2d 1114 (1978)	2, 3
United Mine Workers v. Pennington, 381 U.S. 657 (1965)	7
United States v. Ballard, 322 U.S. 78 (1944)	23
Vendo Co. v. Lektro-Vend. Corp., 433 U.S. 623 (1977)	7
Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909)	3
Watson v. Buck, 313 U.S. 387 (1941)	3
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955)	14

TABLE OF AUTHORITIES CITED

Constitutions

	Page
California Constitution, Article 3, Section 5	2
United States Constitution, Eleventh Amendment	3

Statutes

California Government Code:	
Section 3066	19
Section 3067	19
Sections 11500 et seq.	21
California Vehicle Code:	
Section 3062	10, 22
Section 3063	18
Section 3066	10, 22
Section 3067	10, 22
Automobile Dealers Day in Court Act, 15 U.S.C.:	
Sections 1221-1225	4
Section 1224	4
Section 1225	4
Clayton Act, Section 2	5
Miller-Tydings Act (50 Stat. 693 (1937), repealed 89 Stat. 801 (1976)	12
Sherman Act, Section 1	6, 7, 8, 12

Texts

Donnem, *Federal Antitrust Laws Versus Anticompetitive State Regulation*, 39 Antitrust L.J. 950, 951 (1970)	15
P. Areeda and D. F. Turner, *Antitrust Law* (Boston 1978)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California,
Appellants,

vs.

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the Central District of California

REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

In the District Court appellees alleged that the California Automobile Franchise Act (hereinafter "the Act") is "preempted by federal law and conflicts with the national economic policy expressed by the federal antitrust laws." (Appendix, p. 17.) Appellees now advance the same argument on appeal as an alternative ground for affirmance of the District Court's partial summary judgment.

The argument should not be considered on this appeal. Though the issue was previously argued to the District Court, appellees' preemption contention formed no part of

the court's reasoning in support of the partial summary judgment. Rather, the court expressly declined to consider appellees' preemption claim (440 F.Supp. at 441) and deliberately limited its partial summary judgment to appellees' procedural due process claim. (Jurisd. Stmt. Exhibit E, p. 56.)

The refusal of the District Court to predicate judgment in any part upon appellees' claim of preemption was prudent: neither the pleadings nor the evidentiary record before the District Court provided a satisfactory basis for upholding the claim, particularly in light of the law applicable to consideration of state regulatory interests under this Court's decision in *Parker v. Brown,* 317 U.S. 341 (1943). In such circumstances, although it is appellees' privilege to assert the claim in support of the judgment *(Langnes v. Green,* 282 U.S. 531, 538-539 (1931)), the decisions of this Court counsel against consideration of the asserted alternative ground for affirmance on review, and in favor of deferral of the question for the lower court's adjudication on remand, where as here the attention of the court below was focused upon other issues and that court expressed no views on the question which appellees contend is controlling. *(Aetna Cas. & Sur. Co. v. Flowers,* 330 U.S. 464, 468 (1947); see *United States v. Ballard,* 322 U.S. 78, 88 (1944); cf. *Dandridge v. Williams,* 397 U.S. 471, 475, fn. 6.)[1]

[1]The state agencies named as defendants herein are entitled, upon such remand, to an order dismissing the suit as to them. (*State of Alabama v. Pugh,* .... U.S. ...., 57 L.Ed.2d 1114, 1116 (1978).)

Article 3, section 5 of the California Constitution, providing that "[s]uits may be brought against the state in such manner and in such courts as shall be directed by law," authorizes consent to suit by action of the California legislature. (See, e.g., *Muskopf v. Corning Hospital District,* 55 Cal.2d 211, 217-218 (1961). The complaint herein contains no allegation that consent has been given to the filing of this suit against the several state agencies. (See *Bennett v. People of the State of California,* 406 F.2d 36, 39 (9th Cir. 1969), cert. den. 394 U.S. 966) In the absence of consent, the State of California and its administrative agencies are immune from suit under the Eleventh Amendment. (*State of Alabama v. Pugh, supra,* 57 L.Ed.2d at 1116).

ARGUMENT

APPELLEES' CLAIM THAT THE CALIFORNIA AUTOMOBILE FRANCHISE ACT IS PREEMPTED BY REASON OF CONFLICT WITH FEDERAL ANTITRUST LAW CANNOT STAND AS AN ALTERNATIVE GROUND FOR AFFIRMANCE OF THE DISTRICT COURT'S PARTIAL SUMMARY JUDGMENT.

A. Invalidation of a state statute upon the assertion that it conflicts with federal antitrust law is unwarranted where no conduct violative of any federal antitrust statute has been pleaded, proved or found, and where no such conduct has been shown to be ratified or encouraged by the state statute.

In any case in which a state's exercise of the police power is challenged under the Supremacy Clause by reason of alleged preemption by a federal statute, this Court's decisions require "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *(Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); see *Ray v. Atlantic Richfield Co.,* ..... U.S. ....., 55 L.Ed.2d 179, 188 (1978).) In the field of antitrust it is clear that Congress never intended passage of the Sherman Act to preclude state regulation affecting the same subject. Thus, it has long been established that the states are free to enact antitrust legislation which is not in conflict with the federal law. *(Watson v. Buck,* 313 U.S. 387 (1941), *Waters Pierce Oil Co. v. Texas,* 212 U.S. 86 (1909).) In the absence of an express or implied intention on the part of Congress to exclude the states from legislat-

ing in a given area, a state statute is void under the Supremacy Clause only to the extent that it conflicts with a valid federal statute.[2] In such circumstances, "[a] conflict will be found where compliance with both federal and state regulations is a physical impossibility . . .' [Citation] or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [Citations]" *(Ray v. Atlantic Richfield Co., supra,* 55 L.Ed.2d at 188-189). Moreover, the rule is clear that an actual conflict must be made clearly to appear before the state law will be deemed invalid under the Supremacy Clause. *(Savage v. Jones,* 225 U.S. 501, 533 (1912).)

That an actual conflict, clearly shown, must be present to support claims of inconsistency of state law with federal antitrust law, is clearly established. *(Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966), reh. den. 384 U.S.

---

[2]Appellees' reliance upon the Automobile Dealers Day in Court Act (15 U.S.C. §§ 1221-1225) as evidence of preemption of the Act by federal antitrust law is misplaced. Though it may be conceded that, as appellees suggest, the Automobile Dealers Day in Court Act provides some indication that "Congress intends the antitrust laws to apply fully to automobile franchising policies," the federal act by no means dictates the conclusion that federal preemption of the subject of the California Act has occurred. In fact, the federal act explicitly provides:

> "This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled."

(15 U.S.C. § 1225) The fact that the same Act, in section 1224, also specifies that it does not "repeal, modify, or supersede" any provisions of federal antitrust law (Appellees' Brief, p. 44) merely indicates that in enacting the Automobile Dealers Day in Court Act, Congress intended any question of such preemption to be resolved without reference to that statute, which neither expands the reach of the federal antitrust laws nor diminishes the authority of the states to regulate the business of motor vehicle marketing.

967).[3] Appellees, however, neither allege nor prove any direct conflict between any provision of the Act and any provision of any federal antitrust statute. Rather, appellees have argued that the Act is preempted by reason of conflict "with the national economic policy expressed by the federal antitrust laws," (Appendix, p. 17).[4] As this Court recently observed of a different, though similarly-directed argument in *Exxon Corp. v. Governor of Maryland,* ..... U.S. ....., 57 L.Ed.2d 91 (1978):

> "This is merely another way of stating that the . . . statute will have an anticompetitive effect . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states' power to engage in economic regulation would be effectively destroyed."

(57 L.Ed.2d at 104-105, footnote omitted.)

---

[3]In *Seagram and Sons, supra,* this Court rejected a claim that a New York requirement involving compilation of price information on liquor sales to wholesalers and retailers by distillers was inconsistent with various provisions of the Sherman Act and section 2 of the Clayton Act, observing, "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists' *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446. We find no such clear conflict in the present case." (384 U.S. at 45)

[4]Appellees asserted that the Act "purports to ratify combinations or conspiracies by the existing motor vehicle franchisees to prevent competition and encourages the formation of such combinations and conspiracies" (Appendix, (p. 17), and that the ability of "one or more actual or potential competitors unilaterally to invoke the injunctive process of the New Motor Vehicle Board . . . is akin to the classical horizontal territorial and market allocations . . . which have uniformly been held to constitute *per se* violations of Section 1 of the Sherman Act." (Appendix, pp. 128-129. See Appellees' Brief p. 42.)

Although cast in the broadest of terms, appellees' claim of preemption by conflict relies specifically and exclusively upon an assertion that dealer conduct in initiating state regulatory procedures under the Act is "akin" to a violation of Section 1 of the Sherman Act. The argument is that "the challenged portions of the Act confer unrestrained power on private persons, acting alone or in concert, to invoke state power to preserve their position in the market place for extended periods of time by arbitrarily precluding the entry or relocation of horizontal competitors." (Appellees' Brief, pp. 45-46, footnote omitted.) Even examined upon its own terms, however, upon the present record the argument is insufficient to justify invalidation of the state regulatory program as being in conflict with federal antitrust law.

Though the complaint speaks specifically in terms of section 1 of the Sherman Act when it alleges "ratif[ication of] combinations or conspiracies by existing motor vehicle franchisees" and "encourage[ment of] the formation of such combinations and conspiracies" (Appendix p. 17), appellees' proof not only fails to establish the existence of a section 1 violation but additionally fails to demonstrate that the Act either ratifies or encourages conduct likely to constitute such a violation.

First, in the trial court appellees not only failed to assert the existence of any agreement, combination or conspiracy, under Section 1 of the Sherman Act, but affirmatively acknowledged that the possible dealer conduct with which they took issue was the ability "*unilaterally* to invoke the injunctive process of the New Motor Vehicle Board." (Appendix, pp. 128-129, italics added.) Under these circumstances appellees' continuing reference to dealer con-

duct in terms of horizontal territorial and market allocations constituting *per se* violations of Section 1 of the Sherman Act (see Appellees' Brief, p. 42) is meaningless inasmuch as no combination or conspiracy, either vertical or horizontal, is shown to exist and hence no conduct violative of Section 1 is present.

Second, appellees' assertion on appeal that the Act "confers . . . power on private persons . . . to invoke state power to preserve their position in the market place . . ."(Appellees' Brief, p. 45) is ineffectual to establish a confiict with federal law. In the absence of conspiracy or the exercise of monopoly power, the private purpose to preserve a market position has never been held, in and of itself, to violate the Sherman Act. Moreover, this Court has on more than one occasion held that resort to governmental processes, even for the specific purpose of eliminating competition, does not violate the antitrust laws *(California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136-137 (1961)) and has confirmed that this principle, based upon the right to petition, extends "to all departments of the Government." *(California Motor Transport Co., supra,* 404 U.S. at 510).[5]

---

[5]If appellees were victims of a bad faith resort to the state procedures established by the Act, their remedy against protesting dealers for harrassive, sham proceedings of a repetitive nature is established by *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972). (See, also, *Vendo Co. v. Lektro-Vend. Corp.,* 433 U.S. 623, 635, (1977) (footnote 6), *Otter Tail Power Co. v. United States,* 410 U.S. 366, 379-380 (1973).) This Court has never suggested, however, that abuse of available process in such a case would necessitate or justify invalidation of the procedures abused.

In the absence of private conduct violative of a federal antitrust statute, appellees' suggestion that the Act "ratifies" or "encourages" such conduct cannot be credited. Lacking proof of a violation thus "ratified" or "encouraged," by the Act, appellees indulge in a facile comparison between the Act's provisions and a market allocation program employed by Holiday Inns, Inc., which was held by the Third Circuit to constitute a *per se* violation of section 1 of the Sherman Act in *American Motor Inns Inc. v. Holiday Inns Inc.*, 521 F.2d 1230 (3d Cir. 1975). The scheme condemned in *Holiday Inns*, however, was entirely unlike the operation of the Act's provisions in all but the most superficial respects. Whenever an application for a franchise was received, Holiday Inns, Inc., as franchisor, solicited comments on the application from the three existing franchisees closest to the proposed site of the new franchise. As appellees themselves point out, responses objecting to the new franchise were treated by the franchisor "as an unreviewable 'veto'" (Appellees' Brief, fn. 38, p. 46), leading the Third Circuit to conclude that the scheme impermissibly enabled the existing franchisees "to divide that market between themselves, thus precluding further intrabrand competition." (521 F.2d at 1242)

Reference to the conduct disapproved in *Holiday Inns* typifies appellees' attempt to foreshorten the focus of examination of the Act and is indicative of the analytical distortion which results. Only by focusing upon the causal relation between the filing of a protest and the delay attendant upon normal administrative procedures, to the exclusion of all administrative procedures which attend the ensuing decision making process, can appellees suggest

even the appearance of a resemblance between the conduct in *Holiday Inns* and the operation of the Act. To say that this treatment parses the statute too discretely is an understatement. By asking the Court conclusively to presume an impermissible result from the thoroughly permissible unilateral conduct of one protesting dealer, appellees' attempted atomization of the statutory program seeks to dispense with any examination of the extent to which the Act's operation (either by delaying the franchisor's plans or by ultimately disallowing them) actually restrains competition or trade, if indeed it does so at all.

Appellees' attempt thus to deflect inquiry away from the Act's consequence to the market is undoubtedly accounted for by the fact that, far from establishing that the Act effectuates anything like an unreasonable restraint of trade (*Standard Oil Co. v. United States*, 221 U.S. 1 (1911)), appellees presented no evidence of the Act's impact in the marketplace. Had appellees proved that the filing of protests led to an unreasonably high incidence of Board decisions prohibiting dealer establishments or relocations, for example, then a resemblance between the *Holiday Inns* scheme and the Act's operation might have been established.[6] But, as appellees themselves acknowledge, the operation of the regulatory process itself has *not* resulted in any such incidence of prohibitions on the es-

---

[6]Such resemblance would not necessarily indicate that a combination or conspiracy had occurred or even that the Act permitted, much less ratified or encouraged, conduct violative of the Sherman Act. Nor would such resemblance in and of itself preclude application of the immunity for state action conferred under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). Existence of the alleged resemblance, in other words, could not in and of itself establish a conflict with federal antitrust law.

tablishment of new franchises or the relocation of existing dealerships.[7]

When the Act's pertinent provisions are considered as a whole, it is obvious that the foreclosure of competition by private parties, which necessarily resulted from the "veto" in the *Holiday Inns* scheme, has no counterpart under the Act. In fact, far from constituting a veto of any sort, the filing of a dealer protest under the Act initiates the very administrative factfinding and decisionmaking procedures (Cal. Veh. Code §§ 3062, 3066 and 3067) which, in direct contrast to the result identified in *Holiday Inns,* ensure that no franchisee's opposition to a new dealership can ever operate as a "veto," since unless a decision of the New Motor Vehicle Board positively bars the establishment or relocation of the dealership on behalf of the public interest, the proposed action must be deemed approved. (Cal. Veh. Code § 3067)[8]

[7]At page 65 of their brief, appellees assert that protests "are in fact almost never upheld on the merits".

[8]Appellees' reliance upon a letter of the California Attorney General to the legislative author of the California Act, expressing concern over a perceived anticompetitive effect of the original bill is likewise misplaced. Appellees advert upon the following language in the Attorney General's letter of August 3, 1973, addressed to State Assemblyman J. A. Gonsalves:

> "Assembly Bill 225 . . . has an apparent anticompetitive effect on the new car market . . .
>
> "The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.
>
> "Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963)."

Thus because the present record demonstrates no private conduct violative of federal antitrust law, and because even private use of the Act's procedures in a manner which might contravene federal law is wholly speculative, appellees' assertion of invalidating conflict amounts to nothing more than the suggestion that the Act's procedures "ratify" or "encourage" resort to the state regulatory program in a manner which might be inconsistent with the economic policies underlying the federal antitrust laws. This Court has never sanctioned invalidation of legislative implementation of a considered state policy upon such slender grounds. (See, *Exxon Corp. v. Governor of Maryland, supra,* 57 L.Ed. 91, 104-105.

Appellees, however, argue that no actual statutory violation need be demonstrated in order to invalidate the Act, and point to the result in *Schwegmann Bros. v. Calvert*

(Appellees' Brief, p. 47. See also, Appendix, pp. 269, 270.)

Appellees conveniently ignore the portion of the letter which explained the reason for opposition to the original bill in light of the bill's particular provisions. That explanation, which is omitted after the first sentence excerpted by appellees, stated:

> ". . . Specifically, the bill requires an automobile manufacturer to notify each dealer in the same line-make in a given metropolitan area or community of its intent to establish or relocate an additional dealership in that area. *Any single dealer may then file a protest with the New Motor Vehicle Board, which determines whether good cause for an additional dealership exists. The manufacturer has the burden of proof to establish good cause before the Board. In connection with this, he must establish that additional competition is required in the market area.*"

(Appendix, pp. 269-270, italics added.)

As appellants pointed out in the court below, the measure which the California Attorney General criticized was thus in practical effect a different bill from the one which was ultimately enacted. (Defendants' Memorandum of September 21, 1976, Re Letter of California Attorney General, with exhibits.)

Distillers Corp., 341 U.S. 384 (1951) as evidence of this proposition. *Schwegmann*, however, provides no support for this assertion. In *Schwegmann*, the State of Louisiana, through a resale price maintenance statute permitted under the Miller-Tydings Act (50 Stat. 693 (1937), repealed 89 Stat. 801 (1976)), authorized distributors and retailers to enter into resale price maintenance contracts establishing minimum prices for the retail sale of liquor. The same state statute also provided for the enforcement of the price maintenance contract against non-signer retailers by authorizing suit against non-signers who knowingly undersold a signatory retailer. But for the Miller-Tydings Act's exemption of state fair trade statutes from the federal antitrust laws, the contract, given operation under both provisions of the Louisiana statute, would have constituted a clear violation of section 1 of the Sherman Act. (341 U.S. at 386, 387) The Court acknowledged the resale price maintenance agreement provisions of the statute to be within the Miller-Tydings exemption but held that the exemption did not extend to the provisions which purported to render non-signers amenable to suit for unfair competition. The contract in its application to non-signers thus remained illegal under the Sherman Act since "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." (341 U.S. at 386)[9] Thus *Schwegmann* authorized no finding of a conflict with the federal antitrust laws simply upon the broad assertion that some conduct allegedly "akin" to an antitrust violation occurs under the state act; nor did *Schwegmann* relieve appellees of the necessity of demonstrating some conduct violative of a federal antitrust statute in the court below, to justify the contention that the Act conflicts with the federal law.[10]

[9]The Court in *Schwegmann* stated: "It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker v. Brown*, 317 U.S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual 'vertical' agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing. A real sanction can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements. Otherwise, the exception swallows the proviso and destroys its practical effectiveness." (341 U.S. at 389)

[10]Appellees correctly point to the recent decision of the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d 431 as an example of a result similar to that reached by this Court in *Schwegmann*. Appellees err, however, in supposing that *Rice* ignored the existence of an antitrust violation in the conduct resulting under the state statute in question in that case (Appellees' Brief 45). Indeed the California high court explicitly stated, "We begin with the proposition that if the conduct of the liquor producers in fixing minimum retail prices did not have governmental sanction or if the imposition of minimum prices upon retailers was not required by the state, but was discretionary with the producer ,there would be a clear violation of the Sherman Act." (21 Cal.3d at 439) To make the point even more plain, the California court's opinion quoted directly the language of Mr. Justice Douglas in the *Schwegmann* decision, holding that the marketing arrangement there considered "would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it." (341 U.S. at 386, cited at 21 Cal.3d at 439-440)

The record in this case thus demonstrates neither an impossibility of compliance with both the Act and federal antitrust law (*Florida Lime v. Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) nor any obstacle posed by the Act to accomplishment or execution of the federal law. (See, *Ray v. Atlantic Richfield Co., supra*, 55 L.Ed.2d

at 188-189) such as would justify a holding of preemption of the Act by conflict with the federal law. For the Court to entertain appellees' assertion of preemption upon this record would be to countenance invalidation of state legislation under the Sherman Act merely upon the unproven allegation that it "encourages" private conduct which neither the Sherman Act nor any other federal antitrust law specifically prohibits. To permit such a result necessarily sanctions nullification of State laws whose only conflict is with a particular economic theory, and thus goes dangerously far toward a return to "the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" (*Ferguson v. Skrupa,* 372 U.S. 726, 731-732 (1963)) This course was long ago rejected by the Court (*Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955)) and the proposed return thereto has since been firmly declined. (*Ferguson, supra,* 372 U.S. at 732) This Court having abandoned the course once traveled by way of the Due Process Clause, that excursion ought not be resumed by way of the comparably-broad contours of "the national economic policy" of the federal antitrust laws.[11]

[11]The spectrum of state laws potentially to be affected by resort to the form of conflict analysis which appellees' argument suggests, extends well beyond the field of motor vehicle marketing and far beyond the borders of California. The breadth of the array of laws in all states which would be affected by such an analysis is suggested by the examples of possibly anticompetitive state laws enumerated by one writer in 1970:

> "Some randomly selected areas include: state control over prices and margins, Sunday closing and other blue laws, restrictive sign-posting regulations such as those which impede price competition between gas stations and between other retail establishments by prohibiting price signs except those too small to be seen, state taxation schemes which discriminate among competitors, building and construction regulations which favor some competitors over others, zoning ordinances or practices used to prevent entry by competitors into certain areas, restrictions on bank branching, "Buy American" and in-state preference laws affecting state purchasing, occupational licensing, restrictions on the advertising of retail prescription drugs and other retail drug restrictions, "fair trade" laws, and franchising practices designed to maximize state or city revenue by insulating franchisees from competition."

(Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation,* 39 Antitrust L.J. 950, 951 (1970))

B. Even if the operation of the Act produced a result otherwise violative of a federal antitrust statute, that result would be permissible as state action under the doctrine of Parker v. Brown, 317 U.S. 341 (1943).

In the previous section of this Argument appellants have pointed out that no violation of federal antitrust law has been shown in this case and hence the record is inadequate to support appellees' assertion that the Act conflicts with the federal antitrust laws by ratifying or encouraging conduct violative of those laws. In *Parker v. Brown,* 317 U.S. 341 (1943), this Court gave effect to a rule, grounded in the principle of federalism, (*City of Lafayette v. Louisiana Power & Light Co.* ..... U.S. ....., 55 L.Ed.2d 364, 374-375 (1978)) which additionally precludes invalidation of the Act, even if it should be concluded that its operation produces a result otherwise violative of federal antitrust law. Hence if the Court were to hold that the record before it justified consideration of the antitrust conflict claim, appellees' argument would nonetheless fail as an alternative ground for affirmance of the District Court's partial summary judgment, for even when state law produces a decidedly anticompetitive

result, such action is not violative of the federal antitrust laws when undertaken by state officials pursuant to an articulated state policy to substitute a system of regulation over a business activity in place of unfettered competition. (*Parker, supra,* 317 U.S. at 351-352; *Bates v. State Bar,* 433 U.S. 350, 361-362 (1977))

In *Parker* the Court held that nothing in the language or the history of the Sherman Act suggested a Congressional purpose to restrain state action and that because "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, and an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress" (317 U.S. at 350-351), the Sherman Act did not prohibit the state from imposing a restraint of trade as an act of government.

Observing that the Sherman Act made no mention of the state as such, the Court observed that there was no suggestion of a purpose to restrain state action in the Act's legislative history. Thus, the Court concluded:

> "... Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum

> of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . .
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."

(317 U.S. at 352)

The doctrine of *Parker v. Brown* is clearly applicable to the present case. California has plainly indicated its intention to displace unfettered competition with a program of state business regulation. The declaration of legislative purpose which accompanied the Act's passage in 1973 expressed the concern of the Legislature for avoidance of undue franchisor control over the independent dealer which had historically attended the unregulated retail market level. (Appendix 165-166) (See, e.g., *Rea v. Ford Motor Co.,* 355 F.Supp. 842 (W.D. Pa. 1973) (operation of "factory stores," fleet sales through independent dealer at factory-fixed prices, *inter alia*) vacated and remanded 497 F.2d 577 (3d Cir. 1974); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.,* 283 F.Supp. 453 (W.D. Pa. 1968) (proliferation of "factory stores" in competition with independent dealerships, price-cutting, saturation advertising) aff'd 417 F.2d 622 (3d Cir. 1969).) The Act was declared to be the legislative response to that concern, and to the related need to ensure fulfillment of dealer obligations and adequacy of service to consumers, in light of the finding that the sale of new motor vehicles within

the state "vitally affects the general economy of the State and the public welfare." (Appendix, p. 165)

In response to these concerns the Act displaced the previous state of unregulated intrabrand competition in the new motor vehicle market with a set of values identified by the Act itself, expressed in terms of criteria for the determination of good cause for disallowance of proposed establishments or relocations of dealerships. (California Vehicle Code section 3063).[12] In giving effect to the values identified by the Legislature, the Act substituted the sovereign authority of the state for the unilateral discretion of the franchisor to create or defeat competition among its franchisees. Under the state's authority, additional franchises may still be established and existing franchises may still be relocated, subject however to considerations of the public welfare which include, but are not limited to, the maintenance or increase of competition among common line-make franchisees. Quite clearly, the

[12]California Vehicle Code Section 3063 provides:

"In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

program effectuated under the Act constitutes an unambiguous choice of regulation over competition in the public interest.

Second, it is the state, and not private interest, which determines the result of the program's operation in all cases to which it applies. (Cal. Gov. Code, §§ 3066, 3067) Appellees, however, dispute this reality with the contention that the role of the state under the Act does not qualify the regulatory program for antitrust immunity because imposition of delay to the franchisor's proposed action pending the administrative inquiry results from unsupervised filing of protests by franchisees. (Appellees' Brief, pp. 50-53) Focusing exclusively upon the contention that the filing of a protest results "automatically" in a "temporary injunction" against dealership establishment or relocation pending administrative inquiry (Appellees' Brief, p. 48), appellees argue that *Parker* is inapplicable because the Act provides for no "meaningful" supervision of the private conduct in the filing of the protest. (Appellees' Brief, p. 51)

Appellees' account of the Act's operation, however, is merely an apparition summoned up from the fact that California enacted a program of selective regulation rather than, for example, a universal permit requirement for every proposed dealer establishment or relocation irrespective of circumstance. California was not bound "to strike at all evils at the same time or in the same way" (*Semler v. Oregon Board of Dental Examiners,* 294 U.S. 608, 610 (1935)) and was unquestionably entitled to conclude that some proposed actions were more needful of the state's attention than others, and to exercise its police power

accordingly. (*A. F. of L. v. American Sash Co.*, 335 U.S. 538, 541-542 (1949)) Indeed the state's determination to focus the regulatory function upon those situations where the interests of affected persons are given expression, without expending its resources where no need is identified was precisely the programmatic choice embodied in the California Agricultural Prorate Act upheld in *Parker v. Brown, supra,* 317 U.S. at 346.[13]

Moreover, under the California Act the protesting dealer possesses no ability to effectuate any anticompetitive result without the positive involvement of the state. The state's involvement is no less real merely because initial post-protest delay results directly from the legislative enactment rather than an intervening adjudicatory procedures. Under *Parker* the kind and extent of procedures utilized by the state to implement its regulatory interest and policy is immaterial.[14] The inapplicability of the federal antitrust laws to state action under *Parker v. Brown,* does not depend upon the procedures by which the substantive result of a state regulatory scheme is effectuated, but rather results where a restraint of trade imposed by

[13]The California Agricultural Prorate Act created an advisory commission which, "[u]pon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone" and following a hearing and the making of prescribed findings, was authorized to grant the petition and select a committee to formulate a proration marketing program. (*Parker, supra,* 317 U.S. at 346-347.)

[14]This is not a case in which private parties are sought to be shielded by the "state action" doctrine of *Parker.* Even in such a case, particular state procedures would be of consequence only to the extent that their absence or character demonstrated a lack of state regulatory interest or rendered state policy indiscernible. Compare *Bates v. State Bar of Arizona,* 433 U.S. 350, 361-362 (1977) with *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 584-585, 594 (1976).

the state is "an act of government which the Sherman Act did not undertake to prohibit." (*Id.* 317 U.S. at 352) No decision of this Court has held that *Parker's* application depends upon utilization of particular procedures at any particular point in the regulatory process, and appellees identify no reason to impose such a condition on *Parker's* availaibility.[15]

Finally, when the Act's protest procedures are viewed as an integrated whole it is clear that control over the decision making process rests in the state and the state

[15]Appellees posit "a *Parker* requirement for adequate procedures" predicated upon the hypothesis that before state action may be deemed exempt from federal antitrust laws, "[w]hen the state regulates on a case-by-case basis at the initiative of private parties, it must provide prior procedures, as it did in *Parker,* if it is to act responsibly" (Appellees' Brief, p. 50). In support of this assertion appellees cite P. Areeda and D. F. Turner, *Antitrust Law,"* (Boston 1978) for the proposition that such procedures are required (1) for presentation of facts and argument against the challenged act, (2) for assurance of the government's conscious consideration prior to approval and (3) for judicial review of the administrative record.

Appellees' reliance upon Areeda and Turner is misplaced to the extent that appellees equate "adequate procedures" with procedures prior to initiation of state action. (Appellees' Brief, p. 50, footnote 41.) In the paragraph of *Antitrust Law* which appellees cite, the authors addressed the question whether a result which obtains by reason of State *inaction* (such as a tariff permitted to take effect in the absence of some negative administrative action by the State) qualifies as state action for purposes of *Parker.* The authors' response was in the negative because: "[s]uch inaction evades statutory approval procedures designed" to fulfill the three enumerated purposes (1 Areeda & Turner, *Antitrust Law,* Paragraph 213f, pp. 78-79). Though the *Antitrust Law* authors do conclude from this that "the general view is correct that official inaction does not constitute sufficient 'state action' to justify an antitrust exemption," the enumeration's significance is that these purposes constitute common statutory objectives of administrative procedure (see, e.g., Cal. Gov. Code §§ 11500 et seq.), which are unfulfilled by agency inaction, *not* that those objectives must be met for state action to qualify for the *Parker* exemption. In the present case, such purposes are met by explicit statutory procedures which govern the administrative decisionmaking process. (Brief for Appellants, pp. 7-9.)

alone. The filing of a protest under California Vehicle Code section 3062 leads to the calendaring of an evidentiary hearing under section 3066, which hearing is governed by specified provisions of the California Administrative Procedure Act. The decision which results is that of the New Motor Vehicle Board, an agency of the state. (Cal. Veh. Code § 3067) The Act's provisions thus by no means permit the private dealer to "masquerade" as the state (see Appellees' Brief, p. 50) or preclude "meaningful supervision" by the state. (Appellees' Brief, p. 51) Control over the substantive result of proceedings commenced under the Act resides fully within the state itself. The California program of regulation is thus clearly "state action" within the doctrine of *Parker v. Brown* and cannot be deemed to constitute an impermissible conflict with the Sherman Act.[16]

---

[16]In a footnote following their discussion of the antitrust conflict claim, appellees argue that the Act violates the Commerce Clause because the prohibition on franchisor activity which attends each protest filed "affects the flow of interstate commerce by delaying the opening of a new channel of interstate commerce and by delaying the sale of new motor vehicles, parts, and accessories at certain locations for indefinite periods." (Appellants' Brief, fn. 43, p. 54.)

Assuming that state regulation of the motor vehicle retail market does "affect" interstate commerce, appellees do not contend that the Act discriminates against interstate commerce (Cf *Dean Milk Co. v. Madison* 340 U.S. 349 (1951); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949)), and offer no proof that interstate commerce is burdened by the Act. But even if appellees had successfully proved that the Act's operation caused the Buick or Chevrolet line of motor vehicles to cease being sold altogether in the local market, that fact would not necessarily warrant a finding that the statute impermissibly burdens interstate commerce, absent some reason to believe that Buick's or Chevrolet's share of the interstate supply of vehicles to Pasadena or LaCanada, California, would not be promptly replaced by other interstate manufacturers. As this Court observed in *Exxon Corp. v. Governor of Maryland, supra*, "The source of consumers' supply may switch . . . but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." (57 L.Ed.2d at 101.) Appellees' argument thus ignores the teaching of *Exxon Corp., supra*, that it is interstate commerce, not merely the divisions of General Motors, which the Commerce Clause protects.

Appellees' additional suggestion that local interests are insufficient to justify the Act's "effect" on interstate commerce (Appellees' Brief, fn. 43, pp. 54-55) is material only to the question whether a burden is "clearly excessive in relation to the putative local benefits." (*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).) That question is pretermitted by appellees' inability to demonstrate that the Act imposes *any* cognizable burden upon interstate commerce.

Finally, appellees argue that the problems to which the Act is addressed affect a nationwide industry and "are therefore problems to be addressed by Congress" rather than the states. (Appellees' Brief, fn. 43, p. 55.) Congress, however, has already stated its intention not to preclude state action in this field. (See *ante*, at footnote 2, p. 4.) Moreover, a virtually identical argument, to the effect that because the petroleum product market is nationwide, no state has power to regulate the retail marketing of gasoline, was soundly rejected in *Exxon Corp., supra*, 57 L.Ed.2d 91. There is no more reason in this case than there was in *Exxon Corp., supra*, to conclude that the Commerce Clause by its own force preempts regulation of the product market.

In any event, although a Commerce Clause claim was pleaded in appellees' complaint (Appendix, pp. 22-23), it was not only unconsidered by the District Court's opinion but was never argued by the parties. In fact, because the partial summary judgment was granted concurrent with denial of appellants' motion to dismiss and before an answer had been filed by the Board, its members, or its executive secretary, the issue was never joined as to these parties. Under these circumstances, and because the record contains no evidence of a cognizable burden on interstate commerce, much less any evidence of an *excessive* burden (*Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371-372 (1976), appellees' Commerce Clause claim ought not be considered on this appeal. (See *United States v. Ballard*, 322 U.S. 78, 88 (1944).)

CONCLUSION

Appellees' claim that the dealership establishment and relocation provisions of the Act are preempted by reason of conflict with the federal antitrust laws is without merit and cannot stand as an alternative ground in support of

the District Court's partial summary judgment. That judgment must be assessed in light of the principles which govern the ostensible grounds for its issuance, and, so assessed, must be reversed.

Dated, September 21, 1978.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California

ROBERT L. MUKAI,
Deputy Attorney General

Counsel for Appellant New Motor Vehicle Board of the State of California,

STEPHEN J. EGAN,
Deputy Attorney General

Counsel for Appellants Department of Motor Vehicles of the State of California, and Doris V. Alexis, Director thereof.

MOTION FILED
JUN 2 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, *Appellants,*

v.

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION, *Appellees.*

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California, *Appellants,*

v.

ORRIN W. FOX, CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION, *Appellees.*

On Appeal from the United States District Court for the Central District of California

MOTION OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION FOR LEAVE TO FILE OUT OF TIME A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

JERRY S. COHEN
MICHAEL D. HAUSFELD
PAUL G. WALLACH
KOHN, MILSTEIN & COHEN
1776 K Street, N.W.
Washington, D.C. 20006
(202) 293-7110

Counsel for the National Automobile Dealers Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, *Appellants,*

v.

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION, *Appellees.*

No. 77- 837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California, *Appellants,*

v.

ORRIN W. FOX, CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION, *Appellees.*

On Appeal from the United States District Court for the Central District of California

---

MOTION OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION FOR LEAVE TO FILE OUT OF TIME A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Automobile Dealers Association ("NADA") hereby moves, pursuant to Supreme Court Rule 42, for leave to file out of time a Brief Amicus Curiae in support of Appellants. This Motion is necessitated by the refusal of certain of the Appellees to consent to the filing of the appended Brief.[1]

The interests of amicus NADA are set forth in detail in its Brief. To summarize, NADA represents the vast majority of automobile dealers of domestic automotive manufacturers throughout the United States, including numerous dealers in the State of California. One of the purposes of NADA, as set forth in its Certificate of Incorporation, is to represent and act on behalf of these dealers "in promoting model laws and the enactment of such legislation as will benefit the trade and the public, recognizing the principle of self-determination in each state."

The determination of the United States District Court for the Northern District of California that Sections 3062 and 3063 of the California Automobile Franchise Act (California Vehicle Code §§ 3060-3069) ("Act")—which sections regulate the establishment of automobile dealer-franchises in the State of California —violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution (Amendment XIV, Section 1), is of obvious significance to all NADA member dealers.

---

[1] Amicus NADA respectfully requests that this Court grant it leave to file, out of time, its Brief Amicus Curiae in support of Appellants. Acceptance of the Brief out of time will not harm, injure or prejudice the interests of any of the parties to this litigation. The Amicus Brief focuses on issues not previously briefed by Appellants. The discussion of these issues will, we respectfully submit, be useful to the Court as it determines this matter.

In recent years, thirty-seven other states have enacted legislation regulating the relationship between motor vehicle manufacturers and their dealer-franchisees. Seventeen of these laws contain provisions similar to Sections 3062 and 3063.

With two exceptions, all of these laws have survived Constitutional challenge.

The decision in this case will, therefore, have a direct and substantial bearing on the relationship of dealer-franchisees with their franchisor-manufacturers in numerous states across the country.

NADA has developed a practical expertise and overall familiarity with the dealer-franchisee relationship with manufacturer-franchisors. It has in the past, for example, participated extensively in legislative hearings at the Federal level which considered the interaction of this relationship and the problems inherent in this area. NADA respectfully submits that this expertise will materially assist the Court in arriving at a decision in this matter.

JERRY S. COHEN

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	2
ARGUMENT	3
A. Introduction	3
B. The Federal Antitrust Laws Do Not Apply to State Action	5
C. The Act Fully Comports With The Commerce Clause and Neither Discriminates Against Nor Unduly Burdens Interstate Commerce	17
CONCLUSION	29
APPENDICES	
Appendix A	1a
Appendix B	3a

TABLE OF CITATIONS

CASES:

Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96 (1889)	17
B&T Distributors, Inc. v. Meister Bran, Inc., 450 F.2d 29 (7th Cir. 1972)	21
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	11, 12, 13
Best & Co. v. Maxwell, 311 U.S. 454 (1940)	23
Best Motor Co. v. International Harvester Co., 252 F.2d 278 (5th Cir. 1958)	21
Bibb v. Navajo Freightlines, Inc., 359 U.S. 520 (1959)	5, 18
Bill Kelly Chevrolet, Inc. v. Calvin, 322 So. 2d 50 (Fla. Dist. Ct. App. 1975)	21
Boston Stock Exchange v. State Tax Commission, 97 S. Ct. 599 (1977)	23

Page

E. L. Bowen & Co. v. American Motors Sales Corp., 153 F.Supp. 42 (E.D. Va. 1957) 22

Breard v. City of Alexandria, 341 U.S. 622 (1950) 24, 25, 26

Brimmer v. Rebman, 138 U.S. 78 (1891) 23

Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940) 21

Cantor v. Detroit Edison Co., 428 U.S. 579 (1977) 10, 11, 16

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 5, 23

Ferguson v. Skrupa, 372 U.S. 726 (1963) 17

Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W. 2d 360 (1960) 21

Forest Home Dodge, Inc. v. Kansas, 138 N.W.2d 214 (Wis. Sup. Ct. 1966) 21

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) .. 9, 10, 16

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 27

Highland Farms Dairy v. Agnew, 300 U.S. 608 (1936) 26

Home Volkswagen, Inc. v. Calvin, 338 So. 2d 1287 (Fla. Dist. Ct. App. 1976) 21, 22

H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 23

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 7

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 23

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 5, 18

Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 48, 71 N.W.2d 420 (1955) 21

Lafayette v. Louisiana Power and Light Co., U.S. ——, 55 L.Ed 2d 364, 98 S.Ct. —— [No. 76-864, 1978].. 14, 15, 16

Page

Lemke v. Farmers Grain Co. of Embden, 268 U.S. 189 (1925) 23

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) 23, 26

Minnesota v. Barber, 136 U.S. 313 (1890) 23

National League of Cities v. Usery, 426 U.S. 833 (1976) 7

Nebbia v. New York, 291 U.S. 502 (1934) 17

Nippert v. City of Richmond, 327 U.S. 416 (1946) 23

North Dakota State Board of Pharmacy v. Shyder's Drug Stores, Inc., 414 U.S. 483 17

Northern Sec. Co. v. United States, 193 U.S. 197 (1904) 8

Olsen v. Smith, 194 U.S. 322 (1904) 7, 9

Panhandle Eastern Pipe Line Co. v. Michigan Publ. Serv. Comm'n, 341 U.S. 329 (1951) 24, 25

Parker v. Brown, 317 U.S. 341 (1943) 7, 8, 9, 17, 26

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 27

Plantation Datsun, Inc. v. Calvin, 275 So. 2d 26 (Fla. App. 173) 21

Southern Pacific Co. v. Arizona, 326 U.S. 761 (1945) .. 5, 17, 18

United States v. Texas State Board of Public Accountancy, 1978-1 Trade Cases, ¶ 62,039 at pp. 74,476, 74,477 (W.D. Tex. 1978) 16

Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc., 142 F.Supp. 469 (D. Minn. 1956) 21

UNITED STATES CONSTITUTION

Art. I, § 8, clause 3 ..... passim

Art. VI, Clause 2 ..... passim

Amendment XIV, § 1 ii

Page

UNITED STATES STATUTES

15 U.S.C. § 1222-1225 20

CALIFORNIA STATUTES

Vehicle Code §§ 3060-3069 ..... passim

MISCELLANEOUS

A Study of the Antitrust Laws, Staff Reports on the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 13 (1956) 18, 19

H.R. Rep. No. 2850, Report on Automobile Dealer Franchises, 84th Cong., 2d Sess. 3 (1956) 20

Statutory Regulation of Manufacturer-Dealer Relationships In the Automobile Industry, 70 Harv. L.Rev. 1239 (1957) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, *Appellants,*

v.

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION, *Appellees.*

No. 77- 837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California, *Appellants,*

v.

ORRIN W. FOX, CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION, *Appellees.*

On Appeal from the United States District Court for the Central District of California

BRIEF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The National Automobile Dealers Association ("NADA") is a nonprofit corporation organized and existing under the laws of the State of Delaware with its principal office at 8400 Westpark Drive, McLean, Virginia 22101. NADA represents in excess of 21,000 independent automobile dealer-franchisees of domestic automotive manufacturers throughout the United States, including numerous dealers in the State of California. NADA members represent all four domestic automotive manufacturer-franchisors, General Motors, American Motors, Ford and Chrysler.

One of the purposes of NADA, as set forth in its Certificate of Incorporation, is to represent and act on behalf of its dealer membership "in promoting model laws and the enactment of such legislation as will benefit the trade and the public, recognizing the principle of self-determination in each state."

The determination of the United States District Court for the Northern District of California that §§ 3062 and 3063 of the California Automobile Franchise Act (California Vehicle Code §§ 3063-3069) ("Act")—which sections regulate the establishment of automobile dealer-franchises in the State of California—violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, is of obvious significance and importance to all NADA members.

In recent years, thirty-seven other states have enacted legislation regulating the relationship between motor vehicle manufacturers and their dealer-franchisees. Seventeen of these laws contain provisions similar to §§ 3062 and 3063.

With two exceptions all of these laws have survived constitutional challenge.

The decision in this case will, therefore, have a direct and substantial bearing on the relationship of dealer-franchisees with their franchisor-manufacturers in numerous states across the country.

NADA has developed a practical expertise and overall familiarity with the dealer-franchisee relationship with manufacturer-franchisors. In the past, it has participated extensively in legislative hearings at the Federal level which considered the interaction between automotive manufacturer-dealers and the problems inherent therein.

The impact of the decision of this Court in this matter will affect not only automotive dealers in the State of California, but dealers in other states as well. NADA respectfully submits that its expertise will allow it to materially assist the Court in arriving at a decision in this matter.

ARGUMENT

A. Introduction

As the means of implementing and enforcing the California Automobile Franchise Act (California Vehicle Code §§ 3060-3069) ("Act"), that state legislature chose to subsequently broaden the duties and responsibilities of the New Motor Vehicle Board ("Board") for California. The Board has since functioned as the legislature's *alter ego,* effectuating compliance with the Act's numerous explicit commands. In this case, Appellees' challenge to the Act and to the Board's responsibilities and duties reaches only those

legislative directives which govern the establishment of a franchisor-dealer within a given California market area.[1]

The District Court's decision was based exclusively on an alleged due process violation. That issue is fully covered in Appellants' briefs. Appellees in their Jurisdictional Statement and Motion to Dismiss, however, additionally assert alternatively that the Act conflicts with the Federal antitrust laws and therefore is invalid under the Supremacy Clause and also constitutes an undue burden on interstate commerce.

Amicus fully supports and adopts herein the arguments set forth in Appellants' Briefs. Amicus also asserts that Appellees' alternative arguments regarding the purported conflict of these states' statutes with the Federal anitrust laws and the alleged undue burden on interstate commerce were not considered by the District Court and therefore are not properly before this Court.

However, should this Court reverse and remand the case for further consideration, Amicus submits it would be in the interests of justice and judicial economy to provide the District Court and other courts considering these issues with some guidance as to its determination of the applicability of the Federal antitrust laws and interstate commerce questions.

---

[1] Although the District Court declared the entire Act unconstitutional, only § 3062, § 3063 and § 3066 as it incorporated § 3063 were actually before that Court. The factual background of this case, along with its procedural history, are set forth in detailed fashion in Appellants' Briefs. The Briefs also discuss the Act and the stated purposes of the California Legislature in enacting it. To avoid repetition, Amicus adopts Appellants' well stated discussion.

In summary, Appellees' argument concerning the supremacy of the Federal antitrust laws is misplaced. Regardless of whether the California State Statutes conflict or do not conflict with the Federal antitrust laws, those laws do not apply to valid acts of government officials pursuant to state command. The basic question is not that of supremacy, but rather of federalism. Where a state commands its officers or public officials or agents to act in a certain manner, that action does not and cannot fall within the proscriptions of the Federal antitrust laws.

Moreover, absent antitrust questions, it has been a longstanding principle of law that state economic regulation will not be set aside by the Federal judiciary except in limited instances where it has been positively established that the regulation places a clear burden on interstate commerce and that burden outweighs the value of the state's purposes for regulation[2] or where the state regulation discriminates against non-state residents in favor of state residents.[3]

B. The Federal Antitrust Laws Do Not Apply to State Action

The specifically challenged sections of the Act are but a part of the overall legislative scheme representing the considered judgment of the California Legislature.

Section 3062 requires that a manufacturer-franchisor notify the Board and each existing franchise within a

---

[2] See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bibb* v. *Navajo Freightlines, Inc.*, 359 U.S. 520 (1959); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443 (1960).

[3] *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

particular market area if the franchisor intends to establish a new franchise or relocate a franchise within the area. If any of the existing franchisees file with the Board a protest to the establishment or relocation of the dealership within fifteen days after receipt of notice, the Board is directed by the statute to issue an order temporarily prohibiting the franchisor from establishing or relocating the proposed dealership until the Board has held a hearing to determine if there is good cause for refusing to permit the intended action.

Section 3063 sets forth the considerations which the Board *must* consider in determining whether good cause exists. These considerations are as follows:

1. Permanency of the investment.
2. Effect on the retail motor vehicle business and the consuming public in the relevant market area.
3. Whether it is injurious to the public welfare for an additional franchise to be established.
4. Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
5. Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

If the Board determines, based upon its consideration of the legislative factors and other relevant information, that there is "good cause" for refusing to

permit the proposed dealership to be established, the *statute* prohibits the franchisor from establishing the proposed franchise.

The legislature placed the burden of proving this "good cause" at the hearing on the protesting franchisee. The Board is required to render its decision within thirty days after the hearing or else the establishment of the proposed franchise is deemed approved. Finally, § 3068 provides that either party may seek judicial review of a final Board decision.

These provisions are that legislature's explicit command. The Board, in implementing these provisions as dictated by the legislature, is but an extension of the legislature.

Sections 3062 and 3063, and the implementing actions of the Board, represent the purest form of state action. The acts of the Board are clearly encompassed within the doctrine of state action immunity of *Parker* v. *Brown,* 317 U.S. 341 (1943).[4]

Appellees charge, however, that the California Act establishes horizontal trade restrictions among competing dealers and thus stands in conflict to the policies of the Federal antitrust laws. Appellees argument misconstrues the principle of *Parker* that state action, regardless of whether it conflicts with policies of the Federal antitrust laws, is *not* subject to the proscriptions of those laws.

---

[4] This doctrine was actually first enunciated not in *Parker* but in *Olsen* v. *Smith,* 194 U.S. 322 (1904). Its constitutional base lies in the concept of federalism. [See, *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976); *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794, 810 (1976)].

The challenged state action in *Parker* was an agricultural program under the California Agricultural Prorate Act. According to the Court

> "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products of the state.' " 317 U.S. at 346.

In *Parker,* plaintiff sought to enjoin enforcement of this program. Plaintiff asserted, in addition to the antitrust claim, that the state legislation imposed an unconstitutional burden on interstate commerce and was preempted by Federal agricultural legislation. The Court rejected all three contentions.

With respect to the alleged antitrust conflict, the Court stated that there was "nothing in the language of the Sherman Act or in its history which suggest that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351.[5]

---

[5] The Court drew a distinction between these types of regulatory measures, and legislation directly authorizing a violation of the antitrust laws,

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. Here . . . it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy." 317 U.S. at 351-52. *See, Northern Sec. Co.* v. *United States,* 193 U.S. 197 (1904).

Parker also emphasized that California "created the machinery for establishing the prorate program"; and that California "acts through the Commission which adopts the program and which enforces it with penal sanctions." *Id.,* at 352. The Court found

> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith,* 195 U.S. 332, 344-45; cf. *Lowenstein* v. *Evans,* 69 F. 908, 910." *Id.*

The basic principles of *Parker* have been recently reaffirmed.

In *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), plaintiff challenged, as a violation of the Sherman Act, a minimum fee schedule for lawyers published by a private county bar association but recognized and supported by the State bar, which "was an administrative agency of the Virginia Supreme Court authorized by statute to administer ethical codes adopted" by that Court.

The Virginia statutes made no mention of minimum fee schedules. Nor did the Virginia Supreme Court's ethical codes. Moreover, there was no evidence that the Virginia Supreme Court ever specifically approved of the State Bar's "suggestions" of adherence to the minimum fees.

On the basis of these facts, this Court rejected the Virginia State Bar's reliance on the state action im-

munity argument. Citing *Parker,* Chief Justice Burger wrote:

> "The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is *whether the activity is required by the State acting as sovereign. . . .*" *Id.,* at 790 (emphasis added)

This Court found that although the use of minimum fee schedules was supported by the Bar Associations, these Associations were merely self-regulatory bodies, with no authority to impose minimum fees upon the legal profession. That the State of Virginia "acting as sovereign" had neither set nor required minimum fees was dispositive of the state action issue:

> "Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees. . . ." 421 U.S. at 790.

The plurality opinion in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1977) also analyzed a *"Parker"* state action claim in terms of whether the challenged anticompetitive action was taken pursuant to state command.

Detroit Edison had for many years provided light bulbs to certain of its customers without additional charge in order "to increase the consumption of electricity." 428 U.S. at 582-84.

Cantor alleged that Detroit Edison was using its monopoly power in the distribution of electricity to restrain competition in the separate market for light bulbs. The utility asserted that its marketing practice was included in a rate tariff approved by the Michigan Public Service Commission, and that as such, the practice was exempt from the antitrust laws under the "*Parker*" state action doctrine.

The Supreme Court disagreed with Detroit Edison. According to the Court, the Michigan statutes did not regulate the distribution of light bulbs, neither the Michigan legislature nor the Public Service Commission had mandated or even studied Detroit Edison's program and the utility's marketing practice did not implement any statewide policy relating to light bulbs. 428 U.S. at 584. Justice Stevens, writing for the majority, distinguished *Parker* as follows:

> "In this case, unlike *Parker,* the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws." 428 U.S. at 591.

The applicability of *Parker* was therefore limited to suits against the sovereign itself.

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), a disciplinary regulation promulgated by the Supreme Court of Arizona restricting attorney advertising was found to be state action. This Court found that this "regulation, though violative of the attorneys' First Amendment rights, was shielded from the Sherman Act by the *Parker* state action doctrine."

The Court held:

> "[The Arizona Supreme] Court is the legitimate body wielding the state's power over the practice

> of law. See, Ariz. Const. Art. 3; * * * and thus the restraint is compelled by the direction of the state acting as sovereign." 433 U.S. at 360.

In applying the *"Parker"* doctrine, *Bates* cites with approval both *Parker* and *Olsen,* and distinguishes *Goldfarb* ["the Virginia Supreme Court did not require use of minimum fee schedules"] and *Cantor*:

> "We believe, however, that the context in which *Cantor* arose is critical. First, and most obviously, *Cantor* would have been an entirely different case if the claim would have been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson,* 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.
>
> Second, the Court emphasized in *Cantor* that the State had no independent regulatory interest in the market for light bulbs. 428 U.S., at 584-585; *Id.,* at 604-605, 612-614 (concurring opinions). There was no suggestion that the bulb program was justified by flaws in the competitive market or was a response to health or safety concerns. And an exemption for the program was not essential to the State's regulation of electric utilities. In contrast, the regulation of the activities of the bar is at the core of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that '[t]he interest of the States in regulating lawers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been

> "officers of the courts."' 421 U.S. at 792. See *Cohen* v. *Hurley,* 366 U.S. 117, 123-124 (1961). More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight. Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor.*
>
> Finally, the light-bulb program in *Cantor* was instigated by the utility with only the acquiescense of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired. See 428 U.S. at 594, and n. 31. The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; *we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."* (emphasis added)[8] 433 U.S. at 361-362.

The California statutes challenged here are similar to those of Arizona in the sense that the state policy is clearly and affirmatively expressed in the legislative regulation, and the state's supervision over the regulated conduct is pervasive and active. As in *Bates,* the regulations reflect a clear articulation of the state's

---

[8] Thus, according to the Court, *Cantor* would have been an entirely different case if the challenged party had been a public official or agency, rather than a private party.

policy with regard to the automotive dealer-franchisee manufacturer-franchisor relationship. As in *Parker,* the state, in adopting and enforcing these regulations, made no contract or agreement and entered into no conspiracy in restraint of trade. Rather, it sought in its capacity as sovereign, to regulate an area of commerce which it found necessary to supervise.

Finally, in *Lafayette* v. *Louisiana Power and Light Co.,* U.S. ——, 55 L.Ed. 2d 364, 98 S.Ct. —— [No. 76-864, 1978], Louisiana cities are granted the power to own and operate electric utility systems. In *Lafayette,* two Louisiana cities brought an action alleging that the practices of several of their private competitors were in violation of the Federal antitrust laws. One competitor counterclaimed, seeking damages and injunctive relief on various alleged antitrust offenses.

The cities' principal argument was that "since a city is merely a subdivision of a state and only exercises power delegated to it by the state," *Parker's* findings regarding the Congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions.

The sharply divided Court, in Parts II and III of the Opinion delivered by Justice Brennan,[1] forcefully rejected the cities' principal argument. The Court reviewed *Parker, Goldfarb* and *Bates,* concluding:

> "These decisions require rejection of petitioners' proposition that their status as such automatically affords governmental entities the 'state action' exemption." 55 L.Ed.2d at 382.

[1] In which Parts Justices Marshall, Powell and Stevens joined, and Chief Justice Burger concurred.

The Court believed its analysis in *Cantor* to be inapplicable in *Lafayette*:

> "*Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement, the situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as an agent of the State." *Id.*

The Court emphasized that, as applied by *Goldfarb* and *Bates,* "*Parker's* state action" immunity doctrine applies only to

> "[O]fficial action directed by [the] State, arises from the basis for the 'state action' doctrine—that given our 'dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, a Congressional purpose to subject to antitrust control the State's acts of government will not lightly be inferred." 55 L.Ed.2d at 382.

The Court also noted that

> "*Parker*'s limitation of the exemption to 'official action directed by the State,' 317 U.S. at 351, is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves." 55 L.Ed.2d at 382.

The Opinion subsequently explains:

> "The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibi-

> tions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the free market." 55 L.Ed.2d at 384.

See, also, *United States* v. *Texas State Board of Public Accountancy,* 1978-1 Trade Cases, ¶ 62,039 at pp. 74,-476, 74,477 (W.D.Tex. 1978).

As in *Lafayette,* the regulations challenged in this case involve official action directed by the state and determined by the state in its capacity as sovereign. The actions of the California Motor Vehicle Board are taken pursuant to that state regulation and in furtherance of an explicit state command. This regulation contemplates, and the Board's conduct involves, state action.

As required by the Court in *Lafayette, Cantor* and *Goldfarb,* the challenged action here is both directed and enforced by the states and is not simply the action of a private party or political subdivision in which the state has acquiesced.

The challenged regulatory schemes represent the considered judgment and command of the California Legislature. Here the very State agencies and State Board charged by the Legislature with enforcement of the Act, have been named as parties defendant, and their conduct in implementing the statute is clearly "required by the State acting as sovereign." *Cantor, supra,* 428 U.S. at 592-593; *Goldfarb, supra,* 421 U.S. at 790.

Given the express mandate of the Act, and particularly §§ 3062 and 3063 and the compelling state interest reflected thereby, the Act which Appellees here have sought to enjoin and have challenged in this action represents a classic example of "state action" which the

Federal antitrust laws were not intended to cover. The supremacy clause is inapplicable.

C. The Act Fully Comports With The Commerce Clause and Neither Discriminates Against Nor Unduly Burdens Interstate Commerce

State regulation of "internal commercial business affairs" is a proper exercise of the police power. *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963); *Parker* v. *Brown, supra; Nebbia* v. *New York,* 291 U.S. 502, 531 (1934); *North Dakota State Board of Pharmacy* v. *Shyder's Drug Stores, Inc.,* 414 U.S. 483. Also state legislative enactments are presumed to be constitutional:

> "A legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which is has transcended its power." *Atchison, T. & S.F.R. Co.* v. *Matthews,* 174 U.S. 96 (1889).

The general proposition is clear that the Federal judiciary is hesitant to interfere in State economic regulation except where there is a clear burden placed on interstate commerce and that burden outweighs the value of the State's reason for attempting regulation or where discrimination is made against outsiders.

Sections 3062 and 3063 are clear in their command. They apply evenhandedly to all manufacturers. The Act places no restrictions upon the access of any motor vehicle manufacturer to any California market. Nor is there any obstruction on the flow of any manufacturer's vehicle into California. See *Southern Pacific*

Co. v. *Arizona, supra.; Bibb* v. *Navajo Freightlines, Inc.,* 359 U.S. 520 (1959); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 443 (1960).

Fundamental to Appellees "Commerce Clause" attack upon the Act is the question of the State's right and power to regulate the establishment of new motor vehicle franchises.

Sections 3062 and 3063 set forth requirements similar to those of the laws of a great many other states. The sections reflect the growing importance of the automobile to the economy of a state and a growing legislative concern for the interests of automobile dealers as small businessmen important to the community, but with significantly less bargaining power than that of the manufacturer-franchisor. [See Appendices "A" and "B" which list citations to such statutes.]

The California Legislature, as did the legislatures of the thirty-seven other states, promulgated this Act with the benefit of extensive hearings, reports and legislative studies. These hearings and studies clearly demonstrated a persistent pattern of unfair dealing between franchisee-dealers and franchisor-manufacturers which had an anticompetitive effect, and which dealing was found to be inimical to the state's economy and public interest.

For example, hearings disclosed that:

> "To the manufacturers the dealership is a sales outlet to be judged solely on its efficiency in furthering the manufacturer's interests. He demands the right to increase, decrease or substitute sales outlets as he deems necessary. The dealer regards himself as an independent businessman and his franchise as a property right, the loss of which will cause him damage. This conflict in interest is between parties of totally unequal economic power. As a result, the manufacturer has been able to determine arbitrarily the rules by which the two parties conduct their business affairs. The rules are incorporated in the sales agreement which the manufacturer has prepared for the dealer's signature. A Study of the Antitrust Laws, Staff Reports on the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary 84th Cong., 2d Sess. 13 (1956).

It was determined that the existence of such imbalance was undesirable and placed too much economic power in the hands of a few:

> "The plight of the dealers is a notable example of the effects of too great concentration of economic power in the hands of a few corporation managers. A single decision by the president of General Motors may vitally affect the business of over 18,000 small business men in every city, town and village in the country. The corporation directs almost every action of the dealer, as though he were an agent or employee, but lets him bear all the burdens and risks entailed by so-called independence." *Id.* at 13.

As to the prevalence of the problem in the industry at large, it was found that "the problems of the General Motors dealers under the franchise are, in the main, common to all dealers in the industry." Senate Report at 14.

As a result, it was recommended that "legislation is needed to equalize the balance of power not heavily

weighted in the manufacturer's favor." Senate Report at 14.

A parallel study reached an almost identical conclusion:

> "Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts." H. Rep. No. 2850, Report on Automobile Dealer Franchises, 84th Cong., 2d Sess. 3 (1956).

In recommending legislation designed to remedy the dealers disparate bargaining position, the importance of automobile dealers to the public was emphasized:

> "While the individual automobile dealer may be classified as a small-businessman, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than $5 billion and employ approximately 668,000 persons. *Id.* at 3-4

Congress enacted an "Automobile Dealer Day in Court Act", 15 U.S.C. § 1222-1225, which it stated was only a step toward solving dealer problems, Senate Report at 97, and expressly preserved for the state the right to enact legislation of their own on the subject. 15 U.S.C. § 1225.

California, as have thirty-seven other states, has taken action in an area of legitimate state concern, an area which the Federal Government preserved for state action.

Indeed, the Courts which have reviewed these statutes have found them properly grounded upon the state's police power. For example, in *Kuhl Motor Co.* v. *Ford Motor Co.*, 71 N.W.2d 420, 427 (Wis. 1955), the Wisconsin Supreme Court rejected a constitutional argument that the motor vehicle dealer franchise statute of that state had no police power justification, saying:

> "It would seem reasonably clear that one of the chief objectives of the legislature in enacting . . . [the statute] insofar as it seeks to regulate the dealings between automobile manufacturers and dealers, is to promote fair dealing, which, of course, is a legitimate exercise of police power."

See, *Forest Home Dodge, Inc.* v. *Kansas,* 138 N.W.2d 214 (Wis. Sup. Ct. 1966) [which again upheld the statute previously examined in *Kuhl*].

The appropriateness of state legislation in this area has been confirmed in a long series of cases—*e.g.*, *B & T Distributors, Inc.* v. *Meister Bran, Inc.,* 450 F.2d 29 (7th Cir. 1972); *Ford Motor Co.* v. *Pace,* 335 S.W. 2d 360 (Tenn. 1960); *Best Motor Co.* v. *International Harvester Co.,* 252 F.2d 278 (5th Cir. 1958); *Buggs* v. *Ford Motor Co.,* 113 F.2d 618 (7th Cir. 1940); *Willys Motors, Inc.* v. *Northwest Kaiser-Willys, Inc.,* 142 F.Supp. 469 (D. Minn. 1956); *Plantation Datsun, Inc.* v. *Calvin,* 275 So.2d 26 (Fla. Dist. Ct. App. 1973); *Bill Kelly Chevrolet, Inc.* v. *Calvin,* 322 So.2d 50 (Fla. Dist. Ct. App. 1975); *Home Volkswagen, Inc.* v. *Cal-*

vin, 338 So.2d 1287 (Fla. Dist. Ct. App. 1976); *see generally* Note, *Statutory Regulation Of Manufacturer-Dealer Relationships In The Automobile Industry,* 70 Harv.L.Rev. 1239 (1957).

The relationship between the interests of motor vehicle dealers and the public interest has likewise been recognized by the courts. For example, in *E. L. Bowen & Co.* v. *American Motors Sales Corp.,* 153 F.Supp. 42 (E.D. Va. 1957), the Court observed:

> "Through the power of a franchise, manufacturers may resort to tactics having a serious effect upon the economies of dealers and, in turn, the public in general." 153 F. Supp. at 46.

The enactment by the California legislature of Sections 3062 and 3063 were clearly an exercise of its reserved police power to regulate internal commercial business affairs which have been found to effect the state's economy and public interest. Moreover, the state's action in this regard occurred in an area specifically reserved for independent state regulation by the Federal Government. The state therefore, had a legitimate and uncontestable right to promulgate these sections.

Further, nothing within the provisions of those sections themselves has the effect of discriminating either directly or indirectly against automobile manufacturers outside as opposed to inside the state of California.

The Act by its very terms applies evenhandly to all manufacturers. Sections 3062 and 3063 address only the grant or relocation of a motor vehicle franchise

for a given line-make in a trade area already served by an existing dealer or dealers in that line-make. The sections apply regardless of where the manufacturer is located.

The statute does not seek to protect local businesses from out-of-state competitors. *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333, 97 S.Ct. 2434, 2445 (1977). The California Act likewise does not attempt to isolate its own economy. *Dean Milk,* 340 U.S. at 354. Nor does the Act prohibit or curtail the flow of interstate goods. There is no restriction upon the access of any motor vehicle manufacturer to any California market.

General Motors' Buicks and Chevrolets continue to be shipped into California for sale through franchised dealers throughout the state, including such dealers in the Pasadena and Glendale markets.

The California Act is not directed to exclusively interstate transactions. *Compare, H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525 (1949), nor does it constitute a regulation "of interstate commerce itself." *Lemke* v. *Farmers Grain Co. of Embden,* 268 U.S. 189 (1925). *See, H. P. Hood & Sons,* 336 U.S. at 537. The Act does not effect a prohibition on the flow of interstate goods. *Brimmer* v. *Rebman,* 138 U.S. 78 (1891); *Minnesota* v. *Barber,* 136 U.S. 313 (1890).

In rejecting the challenge that state regulation has impermissibly discriminated against interstate commerce, this Court has found the absence of similar factors controlling in its findings of no discrimination.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission,* 341 U.S. 329 (1951). *Compare, Breard* v. *City of Alexandria,* 341 U.S. 622 (1950).[8]

In *Panhandle,* the appellant "natural gas company" transported that commodity in interstate commerce for distribution and sale in the State of Michigan. Appellee was a public utility of that state which distributed gas to domestic, commercial and industrial consumers in and around the City of Detroit and obtained its entire supply of natural gas from the appellant. In response to Panhandle's proposal to secure large industrial customers for the direct sale of natural gas in Michigan, the Michigan Public Service Commission issued an order requiring the company to obtain a certificate of public convenience and necessity before engaging in such direct sales. Noting that the end result of the order "might be the prohibition of particular direct sales," (341 U.S. at 334) by Panhandle the Court rejected the argument the company's right "to compete for the cream of the volume business without regard to the local public convenience or necessity," (*Id.*) was embodied in the Commerce Clause:

> "It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certified utility where the public convenience and necessity would not be served by direct sales. That there is neither discrimination nor prohibition here saves this regulation from the rule of such cases as *Hood and Sons* v. *DuMond,* . . . where a state was said to have discriminated against interstate commerce by *prohibiting* it because it would subject local business to competition. And the statute under which the Michigan Commission acted does not distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility. *Id.* at 336-37 (citations omitted) (emphasis added)."

[8] See, Brief of Appellees in *Exon Corp., et al.* v. *Maryland,* December 17, 1977 [Appeal Nos. 77-10, 77-11, 77-12, 77-47 and 77-64].

Appellees here distribute their goods in the California markets through sales to franchisees. The Act does not operate as a "prohibition" nor does it distinguish between an "interstate or intrastate" company desiring to operate within the California retail market.

Similarly, in *Breard,* this Court rejected the argument that a local ordinance constituted a discrimination against interstate commerce where the goods of interstate solicitors were not denied entry within municipal borders. The City of Alexandria, Louisiana, by ordinance required door-to-door salesmen to obtain the consent of residents before engaging in such solicitation. Although the statute on its face applied equally to out-of-state and in-state sellers, appellants nevertheless argued that the law placed "an undue and discriminatory burden upon interstate commerce . . . in effect . . . tantamount to a prohibition of such commerce," favoring the operation of local retail merchants. 341 U.S. at 635. Rejecting appellant's argument that the fact that the statute imposed significant financial burdens upon its operations constituted an undue burden upon interstate commerce, the Court held:

> "[T]he usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally immaterial and a matter for adjustment at the local level in the absence of federal legislation. . . . Taxation that

> threatens interstate commerce with prohibition or discrimination is bad, . . . but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason. 341 U.S. at 638.

As in *Breard,* the challenged regulations here leave all out-of-state sellers on the same basis. Since there are no local manufacturers, there is no discrimination and the Act is merely the exercise of justifiable regulations as opposed to prohibited discriminatorily conduct.

The flow of Appellees' product here is neither prohibited nor curtailed by the California Act. The "usual methods of seeking business are left open by the ordinance."

Indeed, the effect of the California Act upon Appellees operation differs in kind from the burdens found to inhere in statutes invalidated by previous decisions of this Court. The Act has absolutely nothing to do with the interstate transportation or movement of automobiles. It sets up, *inter alia,* certain regulations governing relations of manufacturer-franchisors and franchisees. The law is directed, at a "wholly intrastate activity". The present factual situation most closely approximates those decisions in which state statutes regulating "essentially local" activity have been sustained notwithstanding their incidental effect upon interstate commerce. See, *e.g., Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. at 352; *Parker* v. *Brown,* 317 U.S. at 361; *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608 (1936).

Statutes which serve a public purpose and do not discriminate against interstate commerce must then be judged as to whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 371-72 (1976); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

The California Act is not "clearly excessive" in its effect on interstate commerce. The Act does not obstruct the flow of any manufacturer's vehicles or products into California. The Act was neither intended nor can it serve to block the sale of a manufacturer's products in California.

The Act regulates the establishment of more dealerships in a trade area than trade in that area will reasonably support. Regulation, however, can take effect only after "good cause" has been established for allowing an additional franchise for the same line make. Such a showing must be based upon a determination as to whether the establishment of an additional franchise would *increase competition* and *therefore be in the public interest."* (emphasis supplied).

The Act does not protect existing dealers from further competition. A proposed dealer cannot be precluded from operating in a market simply on the ground that an existing dealer in the same line-make is already present in that market.

Further, the Act does not perpetuate a dealer who is an inadequate representative in a market; nor does it not preclude the termination or nonrenewal of his franchise. It does, however, set forth certain proce-

dures that must be followed when that action is taken. (§§ 3060 and 3061).

In any case, the statute specifically provides that either party may seek judicial review of the final Board decision. The entire process, therefore, is further protected against arbitrary or unreasonable action by reason of direct access to the California courts to challenge any Board decision.

As in *Panhandle* and *Breard,* the challenged sections of the California Code are valid state regulation "not absolute prohibition." No burden on interstate commerce is involved and there is no discrimination between out-of-state and in-state automotive manufacturers. The sections seek to regulate an area of the California economy which has been found to have involved unfair business practices which affect the economic well-being of state businesses and the public interest. Sections 3062 and 3063 are clearly valid state regulation of the internal commercial business affairs of the State of California and in no way violate the Commerce Clause of the United States Constitution, nor do they unlawfully discriminate against out-of-state businesses.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellants' Briefs, the decision of the United States District Court for the Central District of California should be reversed.

JERRY S. COHEN
MICHAEL D. HAUSFELD
PAUL G. WALLACH
KOHN, MILSTEIN & COHEN
1776 K Street, N.W.
Washington, D.C. 20006
(202) 293-7110

Counsel for the National Automobile Dealers Association

Dated: June 1, 1978

APPENDIX

APPENDIX A

Summary of State Statutes Which Prescribe Conditions Under Which New or Additional Franchise Outlets Are Permitted in the Community or Territory of an Existing Franchise Dealer

State	*Applicable Section of State Law*
Arizona	Arizona Revised Statutes 28-1304.02
California	California Vehicle Code 3062, 3063
Colorado	Colorado Revised Statutes 13-11-20
Florida	Florida Statutes Section 320-642
Georgia	Georgia Code Section 84-6610(f)(10)
Hawaii	Hawaii Revised Statutes 437-28(a)(22)(b)
Iowa	Iowa Code Annotated Section 322A.4
Massachusetts	Annotated Laws of Massachusetts 93B Section 4(3)(1)
Nebraska	Revised Statutes of Nebraska Section 60-1422
New Hampshire	New Hampshire Revised Statutes Annotated Section 357-B, Section 4(III)(1)
New Mexico	New Mexico Statutes Annotated Chapter 6 (Laws of 1973)
North Carolina	North Carolina General Statutes Section 20-305(5)
Rhode Island	Rhode Island Statutes Section 31-5.1-4(c)(11)

South Dakota	South Dakota Codified Laws Section 32-6A-3, 4
Tennessee	Tennessee Code Annotated Chapter 17 Section 59-1714(j)
Vermont	Vermont Statutes Annotated Title 9 Chapter 107 Section 4074(c)(9)
Virginia	Virginia Code Annotated Section 46.1-547(d)
Wisconsin	Wisconsin Statutes Annotated Section 218.01(3)(f)
West Virginia	West Virginia Code Volume 14 Section 47-17-5(i)

APPENDIX B

States (Including the Commonwealth of Puerto Rico) Which Provide Certain Rights by Law to Franchise Motor Vehicle Dealers—Generally Including a Provision Which Protects the Franchise Dealer from Arbitrary and Unreasonable Cancellation of His Franchise Without Due Cause.

(In addition to the states listed here, those states listed on Appendix "A" also generally have comparable provisions).

State	*Applicable Section of State Law*
Arkansas	Arkansas Statutes Section 75-1501 et seq. (defeated at referendum, Nov. 6, 1962); Section 75-160 et seq. (Acts 1949, No. 142, amended 1959)
Connecticut	Connecticut General Statutes Section 14-51 et seq.
Idaho	Idaho Code Section 49-135 et seq.
Kansas	Kansas Statutes Annotated Section 8-126 et seq.
Kentucky	Kentucky Revised Statutes Section 190.010 et seq.
Maine	Revised Statutes of Maine Annotated Chapter 29, Section 1 et seq.
Maryland	Annotated Code of Maryland Article 66-1/2 Section 61 et seq.
Minnesota	Minnesota Statutes Annotated Section 168.27 et seq.
Mississippi	Mississippi Code Annotated Section 8071.3
New Jersey	New Jersey Statutes Annotated Section 39:10-1 et seq.

New York	McKinney's Consolidated Laws of New York Annotated, General Business Law Section 195 et seq., Vehicle and Traffic Law Section 415 et seq.
North Dakota	North Dakota Century Code Section 39-22-01 et seq., Section 51-07-01 et seq.
Ohio	Page's Ohio Revised Code Annotated Section 4517.01 et seq.
Oklahoma	Oklahoma Statutes Annotated Title 47 Section 22.15a, Title 47 Section 561 et seq.
Pennsylvania	Purdon's Pennsylvania Statutes Annotated Title 75 Section 409, Title 69 Section 601 et seq., Title 63 Section 801 et seq.
Commonwealth of Puerto Rico	
South Carolina	Code of Laws of South Carolina Section 46-91 et seq.
Texas	Vernon's Texas Civil Statutes, Cities, Towns and Villages Article 1015e, State Highways Article 6686

see

7 7

8 4 9